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Supreme Court, U.S.
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No. 07-____

In the Supreme Court of the United States

AUSTIN RANDOLPH, PETITIONER,

v.

CHRISTOPHER RAYGOZA, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal habeas court may disregard a state trial court's factual finding that witnesses lacked credibility, made after evaluating their in-person testimony, because that finding was made implicitly rather than explicitly?

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PETITION FOR A WRIT OF CERTIORARI

Warden Austin Randolph respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 474 F.3d 958 (7th Cir. 2007). The opinion of the district court (App. 16a-47a) is reported at 361 F. Supp. 2d 779 (N.D. Ill. 2005). The order of the Supreme Court of Illinois (App. 49a) denying a petition for leave to appeal is reported at 198 Ill. 2d 604, 766 N.E.2d 243 (2002). The order of the Appellate Court of Illinois (App. 50a-81a) is unreported, but its judgment is reported at 324 Ill. App. 3d 1136, 805 N.E.2d 755 (2001).

JURISDICTION

The court of appeals entered judgment on January 25, 2007, and denied rehearing en banc over the dissent of four judges on March 21, 2007. On June 20, 2007, Justice Stevens extended until July 19, 2007, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

Respondent was charged with and convicted of murder and attempted murder following a bench trial in state court. App. 50a. He filed a motion for a new trial, arguing that his counsel was ineffective in violation of the Sixth Amendment for failing to call additional alibi witnesses. *Id.* at 17a. After an extensive hearing at which all of those witnesses testified, the state trial court denied the motion and sentenced respondent. *Id.* at 50a. The state appellate court affirmed, and the state supreme court denied respondent's petition for leave to appeal. *Id.* at 49a-81a.

Respondent filed a federal habeas petition, which the district court denied. *Id.* at 16a-47a. The court of appeals reversed, and then denied rehearing over the dissent of four judges. *Id.* at 1a-15a. In conflict with the federal habeas statute and this Court's decisions, the court of appeals failed to credit the state trial court's implicit factual finding that the additional alibi witnesses were not credible.

1. John Ribota, Hugo Munoz, Leo Dorado, and Miguel Macias were sitting inside a Chicago pizzeria when respondent and his codefendent entered and flashed gang signs at them. *Id.*

at 51a-52a. Raul Quezada, a member of respondent's street gang, was standing outside the pizzeria serving as a lookout. *Id.* at 53a-54a. Respondent pulled out a handgun and walked toward the four men. *Id.* at 52a. His codefendant yelled out "kill him, kill him, shoot him," and respondent opened fire. *Ibid.* Macias died from a shot in the back. *Ibid.* Munoz was shot in both arms and the buttocks. *Ibid.* Respondent and his codefendant then ran out of the pizzeria and fled. *Ibid.*

While the shooting took place, James Parker was walking past the pizzeria with his family. *Ibid.* He saw two Hispanic men standing in the doorway, and he heard one shout out "shoot him, shoot him, kill him[,]" followed by six or seven shots. *Ibid.* He took cover in a nearby doorway and, after the shooting stopped, saw two men run by. *Ibid.*

2. At a bench trial, Ribota, Munoz, and Dorado identified respondent as the shooter. *Id.* at 51a-52a. Two of the three men remembered respondent having a distinctive blond ponytail at the time of the shooting. *Id.* at 52a. Parker testified to the command he heard immediately before the shooting. *Ibid.*

After pleading guilty in juvenile court to first degree murder and attempted murder, Quezada testified that, immediately before the shooting, he saw respondent hand his codefendant a .38 caliber handgun and the two walked into the pizzeria. *Id.* at 53a-54a; R.15-2 at J9-J17. Quezada then heard shots and ran away. App. at 54a. He recalled respondent having a "gold" ponytail at the time. *Ibid.* Police found .38 caliber bullets and bullet casings at the crime scene. R.15-2 at J34.

In addition, the former girlfriend of respondent's codefendant testified that she saw respondent and his codefendant in the area of the shooting shortly before it occurred. App. 52a. She saw the codefendant again later that night, and he told her "the boys" shot someone at a pizza place. *Id.* at 52a-53a. In his defense, respondent called his ex-

girlfriend as an alibi witness. *Id.* at 54a-55a. She testified that, at the time of the shooting, she was with respondent at his family's residence in a northern suburb of Chicago. *Ibid.*

3. After the trial court found him guilty of murder and attempted murder, respondent hired new counsel and moved for a new trial, arguing that his counsel was ineffective for failing to call additional alibi witnesses. *Id.* at 55a. At a hearing on the motion, respondent called five witnesses who claimed they saw him at his family's suburban residence. *Id.* at 55a-62a. Two additional witnesses testified that they heard respondent's voice over a speaker phone during a call placed to his family's home that evening. *Id.* at 55a-57a, 60a-61a. All of these witnesses were either immediate family members or close family friends. *Id.* at 55a-62a.

In rebuttal, the State called respondent's former counsel, who testified that he interviewed four of the additional alibi witnesses but chose not to call them for strategic reasons. *Id.* at 65a-71a. Counsel stated that he opted not to interview three other potential alibi witnesses because they were children. *Id.* at 67a. The State also introduced evidence of an "alibi script" produced by two of the uncalled witnesses. *Id.* at 56a, 64a.

The trial court, which had been the finder of fact at respondent's bench trial, denied the motion for a new trial. *Id.* at 71a. Applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the court held that respondent's former counsel made "a rational decision as a competent lawyer" not to call the additional witneses, that certain witnesses "would [not] have detracted" from the State's case, and that the court remained convinced that respondent was the shooter and was not at his family's house at the time of the shooting. R.15-6 at U14-U15, U24, U31, U40-U41.

4. The state appellate court affirmed, holding that respondent's counsel made strategic decisions not to call the

additional alibi witnesses, and that respondent was not prejudiced by their absence from the trial in any event. App. 72a-79a. The state supreme court denied review, and the federal district court denied respondent's petition for a writ of habeas corpus. *Id.* at 49a, 16a-47a.

5. A divided panel of the court of appeals reversed and granted habeas relief, holding that the state appellate court unreasonably applied *Strickland*. *Id.* at 1a-15a. The majority first discounted counsel's strategic rationale, reasoning that trial counsel and the state courts failed to consider the cumulative effect of calling complementary alibi witnesses. *Id.* at 9a-13a. The majority next determined that the trial court's holding of no prejudice was objectively unreasonable. *Id.* at 13a-14a. It explained that the combined testimony of the alibi witnesses was so strong that the state courts' holding of no prejudice was "outside the boundaries of permissible differences of opinion." *Id.* at 9a, 14a. In so holding, the court of appeals did not acknowledge, let alone accord deference to, the trial court's implicit factual finding that the additional alibi testimony was incredible.

In dissent, Judge Bauer concluded that the state court's holding was not an objectively unreasonable application of *Strickland* to the facts of the case. *Id.* at 15a. The court of appeals then denied the State's petition for rehearing or rehearing en banc over dissents by Judges Bauer, Evans, Kanne, and Manion. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

In *Marshall v. Lonberger*, 459 U.S. 422 (1983), this Court held that implicit factual findings made by state courts are entitled to deference in federal habeas corpus proceedings. Federal courts of appeals have been unanimous that this principle survives the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and that 28 U.S.C. § 2254(e) requires deference to such findings. Nevertheless, the Seventh Circuit failed to accord any deference to the state courts' implicit finding that testimony by the seven additional alibi witnesses petitioner presented at his post-trial hearing was incredible. The very judge who was the finder of fact at respondent's bench trial evaluated the live, in-person testimony of these witnesses and remained convinced that respondent was the murderer. R. 15-6 at U41-U42. This determination was based on the necessary (albeit implicit) factual finding that the additional alibi testimony was not credible, for it was not possible for the state court to believe this testimony and still conclude that respondent committed the murder. The court of appeals did not acknowledge these findings, let alone accord them the deference that 28 U.S.C. § 2254(e) and *Lonberger* require. Accordingly, petitioner respectfully requests that this Court issue a writ of certiorari and summarily reverse the Seventh Circuit's judgment or, in the alternative, set the case for full briefing and argument, in order to reaffirm *Lonberger*'s holding that obvious, implicit state court factual findings are entitled to deference by federal habeas courts. Sup. Ct. R. 10(c) (certiorari warranted when court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

I. Under *Marshall v. Lonberger*, Implicit Factual Findings Made By State Trial Courts Are Entitled to Deference In Federal Habeas Proceedings.

In *Marshall v. Lonberger*, this Court reversed the Sixth Circuit's judgment granting a writ of habeas corpus. 459 U.S. 422 (1983). The Sixth Circuit had credited the testimony of Lonberger, the habeas petitioner, after the state trial court failed "to make express findings" regarding his credibility.

The *Lonberger* Court recognized that state court factual findings carry a "presumption of correctness" in federal habeas proceedings, and that the Sixth Circuit had "failed in at least one major respect to accord those [factual] determinations the 'high measure of deference' * * * they are entitled." *Id.* at 432 (quoting *Sumner v. Mata*, 455 U.S. 591, 596-598 (1982)). Specifically, this Court held that the state trial court's legal ruling "was tantamount to a refusal to believe the testimony of [Lonberger]." *Lonberger*, 459 U.S. at 434. The Sixth Circuit therefore erred in crediting Lonberger when it was clear from the record that the state trial court implicitly rejected his testimony. *Ibid.*; *see also Parke v. Raley*, 506 U.S. 20, 35 (1992) (factual inferences drawn by state trial courts are entitled to presumption of correctness on federal habeas review) (citing *Lonberger*, 459 U.S. at 431-32).

Since *Lonberger* and *Parke* were decided, Congress has codified the requirement that federal habeas courts accord deference to state courts' fact-finding generally. *See* 28 U.S.C. § 2254(e). And consistent with *Lonberger*, this Court has made clear that implicit findings of fact are entitled to the same deference under § 2254(e) that express findings enjoy. In *Uttecht v. Brown*, 127 S.Ct. 2218 (2007), this Court reversed the Ninth Circuit's judgment granting habeas relief based on a claim that the state trial court erroneously excused a potential juror. *Uttecht* explained that "[d]eference to the trial court is appropriate because [that court] is in a position to assess the

demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing" potential jurors. *Id.* at 2224. *Uttecht* also noted that such deference "is owed regardless of whether the trial court engages in explicit analysis regarding impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Id.* at 2223. This Court thus reaffirmed the principle from *Lonberger* that federal habeas courts owe special deference to the findings, express or implied, of state trial courts that have evaluated the "demeanor" of witnesses in person. *See Lonberger*, 459 U.S. at 434 (federal law "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them").

Recent lower court decisions are to the same effect. For example, in *Campbell v. Vaughn*, 209 F.3d 280 (3d Cir. 2000), the Third Circuit held that a state trial court's implicit factual finding was entitled to deference under § 2254(e). In that case, a habeas petitioner alleged that his trial counsel had been ineffective for failing to inform him that he had a right to testify. *Id.* at 288. After a hearing where the petitioner testified that he had not been told of this right but his former counsel testified that the petitioner had been so informed, the state trial court rejected the claim. *Id.* at 283-85. The court did not "explicitly" credit the testimony of counsel over that of petitioner, but the court stated that the petitioner's argument was "unsupported" and that he had "failed to carry his burden" to establish ineffectiveness. *Id.* at 284-85.

The Third Circuit determined that the state trial court had "implicitly discredited" the petitioner's testimony based on "the [state] court's legal conclusions and the rational deductions that we can draw therefrom." *Id.* at 288-89. The court noted that it needed to analyze the "legal conclusion" of the trial court and then "reason backward to the factual premises that, as a matter of reason and logic, must have undergirded it." *Id.* at 289. That

is, the state trial court must have determined that the petitioner had been warned about his right to testify, because otherwise its rejection of his claim "would be irrational." *Ibid.* Citing *Lonberger* and *LaValle v. Delle Rose*, 410 U.S. 690 (1973), the Third Circuit concluded that it was "bound by [the state trial court's] implicit resolution of the credibility dispute between [the petitioner] and his trial counsel." *Campbell*, 209 F.3d at 290. It therefore deferred to this factual finding, as required by § 2254(e).

Like the Third Circuit in *Campbell*, the courts of appeals have followed *Lonberger*'s holding that clear but implicit factual findings made by the state trial courts must be presumed correct by federal habeas courts. *See Caldwell v. Maloney*, 159 F.3d 639, 650 n.13 (1st Cir. 1998) (factual findings that may be "inferred from a judge's ultimate ruling" are entitled to "a presumption of correctness"); *Whitaker v. Meachum*, 123 F.3d 714, 715 n.1 (2d Cir. 1997) ("deference is owed to implied as well as express findings of fact" made by state courts) (internal quotations omitted); *Hartman v. Blankenship*, 825 F.2d 26, 28 n.2, 31 (4th Cir. 1987) (deferring to implicit finding of fact derived from state trial court's legal conclusion); *Guidry v. Dretke*, 429 F.3d 154, 165 (5th Cir. 2005) ("[g]ranting deference to state court's implicit and explicit historical factfindings predates AEDPA, moreover, and is in fact a bedrock principle of federal habeas jurisprudence"); *Powell v. Collins*, 332 F.3d 376, 388-89 (6th Cir. 2000) (§ 2254(e) deference also applies to "implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility"); *Conner v. McBride*, 375 F.3d 643, 654 (7th Cir. 2004) ("[t]he court's implicit decision to credit the evidence [against the habeas petitioner] is entitled to our deference, absent clear and convincing evidence to the contrary"); *Perry v. Kemna*, 356 F.3d 880, 884 (8th Cir. 2004) ("the underlying factual findings are entitled to deference"); *Weaver v. Palmateer*, 455 F.3d 958, 964 (9th Cir. 2006)

(finding that state trial court made implicit credibility determination in denying habeas petitioner's claim); *Smith v. Gibson*, 197 F.3d 454, 459 (10th Cir. 1999) (noting that state court's implicit credibility finding should be accorded deference under § 2254(e)); *Freund v. Butterworth*, 165 F.3d 839, 858 n.30 (11th Cir. 1999) (implicit factual finding accorded deference); *but see Goldyn v. Hayes*, 444 F.3d 1062, 1065 n.5 (9th Cir. 2006) ("[w]e are not convinced that we are bound by a state court's implicit findings under AEDPA"). As shown below, the Seventh Circuit's decision in this case cannot be reconciled with the settled rule in *Lonberger*.

II. The Seventh Circuit's Decision Disregards *Lonberger* And Its Progeny.

The court below failed to defer to the clear, implicit factual findings made by the state trial court. The opinion simply ignores this Court's rule in *Lonberger*, reaffirmed in *Parke* and *Uttecht*.

The state trial court's implicit finding could not have been clearer. The court rejected respondent's post-trial claim that his trial counsel was ineffective for failing to call additional alibi witnesses. App. 17a, 50a. In support of this claim, respondent presented seven additional alibi witnesses at a post-trial hearing, none of whom testified at trial. *Id.* at 55a-62a. After the State cross-examined these witnesses and presented its case in rebuttal, the trial court denied the claim. *Id.* at 71a. In fact, the same judge who was the finder of fact at trial presided over the post-trial proceedings and found that respondent's trial counsel had not been deficient, and also conclusively rejected respondent's alibi that he was at his family's house at the time of the murder and reaffirmed that respondent was the shooter. R. 15-6 at U14, U24, U31, U40-U42.

This holding rested on the clear, implicit finding that the additional alibi witnesses were incredible. For, in this case, it

was simply impossible for the state trial court — after evaluating all of the alibi witnesses in person — to have found that petitioner committed the murder without rejecting their testimony. That is because respondent's alibi witnesses directly contradicted the State's evidence at trial, where three eyewitnesses identified respondent as the man who shot at them in a Chicago pizzeria. App. 51a-52a. The state trial court had to choose one account over the other, and by reiterating that it believed respondent was the shooter (U40-U42), that court made a clear, implicit factual finding that it did not believe the additional alibi witnesses. The district court recognized this implicit finding, noting that "to assume that the [alibi] witnesses's testimony was all true contradicts" the state trial court's findings. App. 39a. As in *Lonberger* and *Campbell*, the state trial court's "failure to grant relief was tantamount to an express finding against the credibility" of the habeas petitioner's witnesses. *Lonberger*, 459 U.S. at 434.

The state appellate court affirmed, holding that respondent's counsel was not deficient and that even if counsel had "put on all of the witnesses * * * as [respondent] now believes he should have" there was not "a reasonable probability" that the result of the trial would have been different. App. 78a-79a. The district court denied respondent's habeas petition. *Id.* at 16a-47a. On appeal, petitioner argued, *inter alia*, that the state courts' factual determinations were entitled to deference under § 2254(e) (Pet. Br. 25-26), and that the state trial court "was able to personally assess [the witnesses'] credibility" *(id.* at 43) and conclusively rejected petitioner's claims. *Id.* at 40-44. The Seventh Circuit rejected this argument without even acknowledging the state courts' implicit findings, let alone according them the deference that *Lonberger* and § 2254(e) require.

Like the Ninth Circuit in *Goldyn*, the Seventh Circuit in this case apparently was "not convinced that [it is] bound by a state

court's implicit findings under AEDPA." *Goldyn*, 444 F.3d at 1065 n.5. This error is so plain in light of *Lonberger* and its progeny that summary reversal is appropriate. *See Gonzalez v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 1614 (2006) (granting summary reversal of "legally erroneous" decision, where error was "obvious in light of" controlling precedent). At a minimum, given its clear departure from the Court's decisions and its incompatibility with the law of other circuits, certiorari is warranted, and the case should be set for full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Seventh Circuit's opinion is fundamentally incompatible with the principles set forth in *Marshall v. Lonberger* and *Uttecht v. Brown*, the judgment below should be summarily reversed. In the alternative, the case should be set for full briefing and argument.

Respectfully submitted.

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JULY 19, 2007

APPENDIX

United States Court of Appeals,
Seventh Circuit

No. 05-2340

CHRISTOPHER RAYGOZA,

Petitioner-Appellant,

v.

DON HULICK,

Respondent-Appellee.

Argued Feb. 7, 2006.
Decided Jan. 25, 2007.
Rehearing and Rehearing En Banc Denied March 21, 2007.

Judge Joel M. Flaum took no part in the consideration of this matter. Hon. William J. Bauer, Hon. Daniel A. Manion, Hon. Michael S. Kanne, and Hon. Terence T. Evans voted to grant a rehearing en banc.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 03 C 1727 — Robert W. Gettleman, Judge.

ARGUED FEBRUARY 7, 2006 — DECIDED JANUARY 25, 2007

Before BAUER, RIPPLE, and WOOD, Circuit Judges.

WOOD, Circuit Judge.

Although this case comes to us on an appeal from a denial of collateral relief, at base it is a "who-dun-it." Christopher Raygoza was convicted in state court for first-degree murder and attempted murder, but he had an alibi. More than that, he had ten available alibi witnesses, most of whom were not related to him, but his attorney made little effort to investigate his alibi, called only one of those witnesses at trial, and failed to offer telephone records that would have corroborated Raygoza's defense. The state courts rejected Raygoza's claim that he had received constitutionally ineffective assistance of counsel, and the district court concluded that federal habeas corpus relief was unavailable. We conclude that counsel failed to meet minimum performance standards and that his actions (or lack thereof) prejudiced Raygoza. We therefore reverse.

I

On June 4, 1997, at approximately 9:45 in the evening, two teenagers were shot at DeArco's Pizzeria, on the southwest side of Chicago. One of them, Miguel Macias, was killed, and the other, Hugo Munoz, was badly injured. According to eyewitnesses, a person flashing gang signs and indicating that he was a "United Latino killer" entered the pizzeria. Macias and Munoz were members of a gang called the United Latino Organization (ULO). After that person left the restaurant, another young man returned with a gun and opened fire. Three members of the ULO who were present at the time identified Raygoza as the gunman and Leslie Matos as the person who first walked into the pizzeria. In addition, Raul Quezada, a young member of the rival Latin Soul street gang, to which Raygoza and Matos belonged, testified that he was at the pizzeria that evening serving as a lookout. Quezada testified that Raygoza, whom he knew as "Froggy," was the shooter.

Other witnesses also supported the State's case. According to the facts as the Illinois Appellate Court recounted them, Matos stood in the doorway of the pizzeria as the violence was unfolding and shouted "kill him, kill him, shoot him." Three witnesses identified the shooter as having a blond pony-tail-a description that matched Raygoza at the time. Other people also testified that someone who looked like Raygoza was on the scene. Jennifer Calatayud testified that she saw Matos and Raygoza outside a party at 62nd Street and Sacramento Avenue around 8 pm. Matos told her that he had "something to do" and would meet her in about 15 minutes. She waited, and he showed up about an hour later, out of breath. He told her that "the boys" had shot someone at the pizza place on California (DeArco's). Later, Raygoza and Matos were identified in photographic arrays and lineups as the guilty parties, and they were arrested and charged with first-degree murder and attempted murder, among other things.

Raygoza's account of his actions that evening is completely different: if true, then the police arrested the wrong person for Macias's murder. That evening, Raygoza's mother, Maria Raygoza, celebrated her 40th birthday with friends and family at their home in the far-north suburb of Highland Park, Illinois. According to Mapquest (a popular internet site), Highland Park is approximately 35 miles away from the scene of the shooting, see http://www.mapquest.com; the website estimates that it would take 52 minutes to drive from the center of Highland Park to West 62nd Street and South California Avenue. A total of nine people, including Christopher, were in the Raygoza home that evening. The next morning, on June 5, Maria took Christopher along with her to an errand at the Daley Center in downtown Chicago; later, he went to the southwest side, where his family had lived until December 1996, to see his girlfriend Desiree Moyet. In the early evening, Raygoza called his mother

at her office and told her that there had been a shooting in the area and that he was afraid that he might be "pinpointed" for it.

His fears were realized two days later, on June 7, after detectives received a tip that "Froggy" was involved in the shooting. On June 11, a detective had a telephone conversation with Attorney Wendy Morgan, who was Maria Raygoza's boss; Attorney Morgan identified herself as Christopher's attorney. On his behalf, she agreed to an interview between Christopher and the police at her office; the meeting was to take place on June 17. Events overtook these plans when the police arrested Raygoza on the evening of June 12 at his home in Highland Park, without notifying Morgan.

After his arrest, Raygoza was subjected to a marathon interrogation by the detectives, who refused his requests to consult with his mother or with counsel. Notes from the state's attorney indicate that Raygoza initially said that he was at home on the evening of June 4 with family and friends, but that later he admitted that he had been present at the shooting and that "Lucky" had done it. His story changed again, twice: first he asked if he could say that "Shadow" was the shooter, and eventually, at 10:55 the next morning (some 13 hours into the interrogation), he signed a statement written out by the state's attorney confessing that he was the guilty party. The state trial court suppressed this confession on the ground that the detectives had violated Raygoza's Sixth Amendment right to counsel. The trial proceeded nevertheless. Raygoza, represented by Attorney Thomas Brandstrader, waived his right to a jury.

At the trial, the state called several witnesses who identified Raygoza as the shooter, although they had not known him before the incident. Quezada testified that he was acting as a lookout, and that "Froggy" (Raygoza) had told him to watch for

police. Quezada did not witness the shooting itself; when he heard shots from inside the pizzeria, he ran away. Although Calatayud testified that she had seen Raygoza at a party near the pizzeria that evening, police reports indicate that she initially told the police that he had not been there. She changed her story two years later—a fact Brandstrader knew.

Brandstrader conducted almost no cross-examination of the state's witnesses, including Calatayud. He did not call any of the other people who had been at the party, even though their names were in the police report. Although, when it came time for the defense case, Brandstrader raised the defense of alibi, he said only that Raygoza was at home in Highland Park at the time "with his mother, Maria Raygoza . . ., Desiree Moyet . . ., and Noemi Cordova." He never mentioned any of the other guests, nor did he mention the fact that Morgan had called Maria's house during the evening to talk to her and Christopher had answered the telephone. Brandstrader called only one defense witness, Moyet. In his closing argument, the prosecutor hammered on the skimpiness of the evidence supporting Raygoza's alibi: "[W]here is Alexis? Where is mom? Where is his brother? Where is the blond lady? Where is the sister?" The trial court found Raygoza guilty. In doing so, the judge too commented on the fact that Raygoza had only one alibi witness, and a biased one at that (his girlfriend).

After the verdict but before sentencing, Raygoza hired a new lawyer. This attorney filed a motion for new trial based on ineffective assistance of counsel, and attached affidavits of seven alibi witnesses who had been available to testify at trial but had not been called. New counsel also submitted other corroborating evidence, including telephone records and train tickets. The trial judge held a hearing on the motion, but even before the hearing began he expressed skepticism about the value of the proceeding. Seven witnesses testified, all

supporting Raygoza's alibi. They were (1) Maria Raygoza, (2) Vincent Raygoza, Christopher's 15-year-old brother, (3) Crystal Raygoza, his 13-year-old sister, (4) Noemi Cordova, a friend of Maria's who had spoken to Christopher several times before arriving at the home and then had seen him there, (5) Luisi Paredes, Cordova's 14-year-old son, (6) Wendy Morgan, and (7) Rodney Adams, Morgan's husband, who confirmed that Morgan had spoken on the telephone at 9:15 pm on June 4 to Christopher (a fact he knew because he recognized Christopher's voice when he answered the telephone). Other witnesses to the murder testified that Eduardo Lerma ("Lucky") was the one who shot Macias and Munoz, to retaliate for an earlier shooting of Lerma, a Latin Souls member, by a ULO member. Lerma and Raygoza bore a strong physical resemblance to one another.

The State responded with evidence about a woman named Chloe Gavin, who was a former friend and landlord of Maria Raygoza, who turned out to be a con artist. Gavin was also at the birthday party at the Raygoza home. Morgan had helped an investigator put together a timeline of events relating to Gavin. The prosecutor believed that this timeline was a disguised script for the alibi witnesses. The timeline stretched from October 17, 1996, to June 1, 1998, and thus covered a great deal of territory beyond June 4, 1997.

Attorney Brandstrader explained his decision to call only one alibi witness at the hearing. The first time he ever spoke to Moyet was on the day she testified. He did not want to call Maria because "mothers are always alibis." Although he met with Maria Raygoza approximately 30 times prior to the trial, he somehow never asked her about her activities around the time of the shooting, and so he never learned that June 4 was her birthday, that she had invited friends over, and that she had taken Christopher to the city the next day. Cordova, he thought,

would be unreliable, and he failed in his three efforts to serve her with a subpoena. He found other problems with Raygoza's siblings, Vincent and Crystal. As for the telephone records, he learned only in September of 1997 about Morgan's conversation with Christopher. His trial strategy instead, he said, was to attack the identification witnesses. But he never attempted to interview any of the three eyewitnesses who had identified Raygoza, nor did he interview Calatayud or the others at the party. The trial court rejected Raygoza's motion for a new trial and a motion to reconsider. The Illinois Appellate Court affirmed, and the Supreme Court of Illinois denied leave to appeal.

This habeas corpus petition followed. In denying relief, the district court commented "I don't think I have the discretion to grant your request for an evidentiary hearing. I think it would be futile. If I'm wrong, the Court of Appeals will tell me I'm wrong. I think this is a closer case than most that we see. I'm obviously disturbed by it." Although the state judge had not said anything about the credibility of the witnesses at the post-trial proceeding, the district court assumed that the judge had not believed them. No other reason, in his view, could explain why the judge did not order a new trial.

II

Aficionados of habeas corpus law are familiar with the standards the Supreme Court has established for claims of ineffective assistance of counsel, but we review them here briefly to set the stage for our discussion. The leading case is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the Court summarized the two components of such a claim as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S.Ct. 2052. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* at 689, 104 S.Ct. 2052. See also *Berkey v. United States,* 318 F.3d 768, 772 (7th Cir. 2003). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052. With respect to prejudice, the Supreme Court clarified that it is not enough to show that the attorney erred, or that the error had "some conceivable effect on the outcome." *Id.* at 693, 104 S.Ct. 2052. But, importantly, "the defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* Instead, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The Supreme Court has reaffirmed this framework repeatedly. See, *e.g., Rompilla v. Beard,* 545 U.S. 374, 380-81, 125 S.Ct. 2456,

162 L.Ed.2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Because this case reaches us as a collateral attack from a state court conviction, we do not apply *Strickland* directly. Our consideration is mediated by the standards set forth in 28 U.S.C. § 2254(d)(1) ("AEDPA"), under which a federal court may issue a writ of habeas corpus only if the state court reached a decision that was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. See *Williams v. Taylor,* 529 U.S. 362, 404-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Here, it is the Illinois Appellate Court's application of *Strickland* to Raygoza's claim that concerns us. This requires us to ask, as the Supreme Court held in *Williams,* "whether the state court's application of clearly established federal law was objectively unreasonable." 529 U.S. at 409, 120 S.Ct. 1495. As we have noted before, to be unreasonable is more than to be incorrect in some absolute sense of the term. It means instead a conclusion "lying well outside the boundaries of permissible differences of opinion." *Hardaway v. Young,* 302 F.3d 757, 762 (7th Cir. 2002). With both the standards established by *Strickland* and the restrictions imposed by AEDPA in mind, we turn to the merits of Raygoza's arguments.

III

It is counsel's performance as a whole that matters, and so it is to that we turn. As an abstract matter, Brandstrader was surely correct to think that it is hard to win on an alibi defense. He may also have been correct to conclude that a defendant is in a weak spot if the only alibi witness he can offer is his mother, or perhaps just a mother and a girlfriend. But generalities fall away when we are dealing with an "n" of one: it is the facts of the particular case, and the particular alibi defense, that matter.

And here, counsel's general impressions about alibi defenses affected both his preparation for trial and his presentation of Raygoza's case at trial, all to Raygoza's detriment.

Had Brandstrader gleaned the information from Maria about the evening party that was easily available for the asking, he would have learned that this was not a case where only the mother was willing to vouch for a defendant's alibi. To the contrary, witnesses both related and unrelated to Raygoza could have been called. A consistent story from all of them would have forced the trier of fact to confront the possibility that Raygoza had been mistaken for another young Hispanic male with a blond ponytail. Perhaps the prosecutor would have responded by attempting to impeach the alibi witnesses' testimony with the "timeline" that Morgan created for Gavin. The idea there was that the timeline (which was created for Gavin and which covered the 20-month period from October 1996 through June 1998) was a "script" for the alibi witnesses for the night of June 4, 1997. Quite a few inferences must be drawn before that timeline destroys the testimony of all or most of the alibi witnesses, however, even if (as the trial judge remarked), the events of June 4 were recorded in "excruciating" detail. It is certainly not such strong rebuttal evidence that our confidence in the outcome of Raygoza's trial is restored because of it.

In a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly. As the Supreme Court said in *Strickland,* "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S.Ct. 2052. Perhaps Brandstrader had formed an opinion about Raygoza's guilt in his own mind and thought that an alibi would be futile. This, however, would hardly distinguish him from legions of defense

counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients' cases before coming to a final decision about trial strategy. At the post-conviction hearing, Brandstrader's explanations for his decision not to call any of the seven additional alibi witnesses Raygoza's new counsel identified were reminiscent of the children's verse "And then there were none." Maria was Raygoza's mother; Vincent, Crystal, and Luis were minors; Cordova could not be specific enough; Wendy Morgan and Rodney Adams might have been impeached by their relationship with Gavin. Even if, however, each of these witnesses might have had vulnerabilities in cross-examination, Brandstrader does not seem to have considered what impact they would have cumulatively. Instead, he picked off each one and wound up leaving Raygoza (as the prosecutor pointed out) with no one but his girlfriend to corroborate his account.

Although we do not lightly conclude that a state court has unreasonably applied controlling Supreme Court law, we note that the inquiry we must conduct is an objective one. As the Supreme Court wrote in *Williams v. Taylor, supra,*

> a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing

> their attention on a subjective inquiry rather than on an objective one.

529 U.S. at 409-10, 120 S.Ct. 1495. The fact that our inquiry must be objective has another consequence that is important in cases like this one, where the original state trial judge also presided over the post-conviction (or here, new trial) proceeding. It means that we cannot accept as conclusive the judge's statement that the new evidence would not have made any difference to the outcome of the case. See *Hall v. Washington,* 106 F.3d 742, 752 (7th Cir. 1997) (holding that even when a judge who presided over the original trial asserts in a post-conviction proceeding that "[petitioner]'s additional evidence would not have changed his mind . . . [t]his cannot, however, be conclusive"). That said, we naturally give great weight to the judge's assessments, particularly on matters relating to the credibility of the witnesses who appeared. In the end, however, we have an obligation to take a fresh look at the case and apply the standards set forth in AEDPA.

An objective inquiry into the basis for the court's guilty verdict in Raygoza's original trial reveals that the trial judge was heavily influenced by Raygoza's lack of evidence supporting his alibi. The judge highlighted the fact that "defense presents one witness, the girlfriend. . . . Her testimony is certainly one of a biased witness. . . . I don't have any trouble saying I don't believe that testimony at all." The judge then pointed to the testimony of the prosecution's three witnesses, comparing the original two sets of witnesses in the course of reaching his guilty verdict. At the conclusion of the hearing on the motion for a new trial, the judge summarized the problems he saw with each of the additional witnesses. He did not, however, pay particular attention to the possibility that in the aggregate, they may have provided powerful evidence for Raygoza's alibi, even though individually each one might have been impeached. In

short, the record shows that the lack of credible alibi witnesses was a significant, if not dispositive, factor in both the original guilty verdict and the denial of the motion for new trial. That makes this case similar to *Stanley v. Bartley,* 465 F.3d 810 (7th Cir. 2006), in which we found that a lawyer's failure to interview and call substantially all of the available alibi witnesses resulted in a performance that did not meet the minimum standard guaranteed by the Sixth Amendment. *Id.* at 813. As we did there, we conclude here that Raygoza did not receive constitutionally adequate representation.

Raygoza is not entitled to relief, however, unless he also can establish that he was prejudiced by his attorney's deficient performance. In order to do so, he must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. We find this test met as well, even taking into account both the AEDPA standard of review and the fact that the trial judge subjectively believed that the array of additional alibi witnesses would not have swayed his judgment. The State's case against Raygoza was not particularly strong. The only evidence apart from the suppressed confession linking him to the crime was eyewitness identification from rival gang members John Ribota, Hugo Munoz, and Leo Dorado, and a passerby who did not see the shooter's face but was able to give a general description of the clothing the perpetrators were wearing as they fled from the pizzeria. (As we noted recently, social science research has revealed serious problems with eyewitness testimony from a stranger, when it is based only on a fleeting glance. See *United States v. Brown,* 471 F.3d 802, 2006 WL 3720245, *1-2 (7th Cir. Dec. 19, 2006). We do not know here whether the shooter was a stranger or Raygoza; the witnesses, however, were nothing like the trained law

enforcement officers whose identification we found reliable in *Brown*.) There was nothing so distinctive about Raygoza's clothing to allow the witnesses to rule out countless other suspects. On the other side, Raygoza's alibi witnesses included both family members and unrelated people; their stories were corroborated by telephone records and train tickets. Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. This undermines our confidence in the outcome of the proceedings so seriously that we conclude that there is a reasonable probability that the result would have been different had Raygoza's attorney presented the testimony of all or most of his alibi witnesses.

IV

We note, prior to concluding, that Raygoza has also argued that his trial counsel was ineffective for failing to conduct a better cross-examination of Jennifer Calatayud. If this had been counsel's only slip, we would have found no reason to criticize the Illinois courts' application of the *Strickland* test. Under the circumstances, however, we see no need to analyze this argument separately: we have found that counsel's performance taken as a whole was deficient, and we have found that Raygoza was prejudiced as a result. Although the Illinois courts identified the correct governing Supreme Court cases, their application of that law was objectively unreasonable. We therefore Reverse the judgment of the district court. The writ of habeas corpus is Granted unless the State of Illinois elects to retry Raygoza within 120 days of issuance of this Court's final mandate, or of the Supreme Court's final mandate.

BAUER, Circuit Judge, dissenting. I respectfully dissent.

I cannot agree that the Illinois Courts, particularly the opinion of the Illinois Appellate Court, was wrong, either by State or Federal standards. And that, I believe, keeps us from second guessing. I would affirm the district court's denial of the writ. The recitation of the facts and the rulings are sufficiently outlined in the majority opinion and that of the state trial court, appellate court, and the district court to make any further discussion unnecessary for purposes of this dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel., CHRISTOPHER RAYGOZA, # K-78157,	)	
Petitioner,	)	No. 03 C 1727
v.	)	Judge Robert W. Gettleman
JERRY BOHLER[1], Warden, Illinois River Correctional Center,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

After a bench trial in the Circuit Court of Cook County, Illinois, petitioner, Christopher Raygoza ("petitioner"), was convicted of murder and attempted murder and sentenced to forty-five years imprisonment. When his state court appeals failed, petitioner filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this court. For the reasons stated below, the court denies the petition in its entirety.

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[1] Because Jerry Bohler is currently the Warden at Illinois River Correctional Center, the court substitutes him as respondent. *See* Rule 2(a) of the Rules Governing Habeas Corpus Cases under 28 U.S.C. § 2254.

I. BACKGROUND

A. Procedural History

Following a bench trial before Judge Stanley Sacks of the Circuit Court of Cook County, Illinois, petitioner was convicted of murder and attempted murder. With the aid of new counsel, petitioner filed a motion for a new trial alleging that his trial counsel was ineffective. After an evidentiary hearing the court denied the motion and imposed sentence.

Petitioner appealed to the Illinois Appellate Court, again alleging ineffective assistance of counsel. The court upheld petitioner's conviction and sentence in an unpublished order. *People v. Raygoza,* 324 Ill.App.3d 1136, 282 Ill.Dec. 136, 805 N.E.2d 755, 2001 WL 34398332 (2001)("*Ill.App.Ct.*"). Petitioner then sought relief in the Illinois Supreme Court, again raising ineffective assistance of counsel claims, and the court denied review. *People v. Raygoza,* 198 Ill.2d 604, 262 Ill.Dec. 623, 766 N.E.2d 243, 2002 WL 215463 (2002). Thereafter, petitioner timely filed the instant petition for a writ of habeas corpus with this court.

B. Trial Testimony

The following facts, which petitioner does not challenge, are drawn from the Illinois Appellate Court's ruling on petitioner's direct appeal. 28 U.S.C. § 2254(e)(1); *Mahaffey v. Schomig,* 294 F.3d 907, 915 (7th Cir. 2002) (unless a habeas petitioner provides clear and convincing evidence to the contrary, a determination of a factual issue by a state court is presumed correct for the purposes of habeas review).

On June 4, 1997, at approximately 9:45 p.m., Miguel Macias and Hugo Munoz were shot in DeArco's Pizzeria on the

southwest side of Chicago. Macias died as a result of the shooting. Two days later, police received a tip that petitioner was involved. The next day, eyewitnesses identified a photo of petitioner and, a few days later, police arrested petitioner at his mother's home in Highland Park, Illinois. Petitioner was interrogated and, after initially denying involvement in the murder, confessed through a written statement. Before trial, petitioner persuaded the court to suppress his confession.

1. The State's Case

Petitioner opted for a bench trial before Judge Sacks and the following evidence was adduced. Three members of a street gang, including one of the victims, testified that on June 4, 1997, they visited DeArco's Pizzeria located on Chicago's southwest side. While inside, they stated than a Hispanic individual entered and flashed a rival gang sign. All three identified that person as petitioner's co-defendant, Leslie Matos. Matos then left the restaurant, and shortly thereafter another individual entered, who all three identified as Raygoza. Once inside, petitioner, pulled out a pistol and pointed it towards them, while Matos stood in the doorway shouting "kill him, kill him, shoot him." Petitioner then began shooting. They tried to escape out the back of the store, but petitioner's bullets hit Munoz in the arms and buttocks and Macias in the back.

A fourth witnesses, James Parker, corroborated portions of the above testimony. Parker testified that he, his fiancée, and his daughter, were walking past DeArco's at about 9:40 p.m. on June 4, 1997, when he saw two Hispanic males standing in the pizzeria's doorway. Parker heard one of them shout "kill him, shoot him, kill him," and then heard six or seven shots.

A fifth witness, Jennifer Calatayud, testified that on June 4, 1997, shortly after 8:00 p.m., she saw petitioner and Matos outside a party on the southwest side of Chicago. She spoke with Matos who told her that he had "something to do" and would meet her later. About an hour later, she met Matos at his home. She testified that he was out of breath and told her that "the boys" had shot somebody at a pizza place.

The State called a sixth witness against petitioner, Raul Quezada. Quezada, a fellow gang member, testified that, a few days before the attack, he had heard petitioner and Matos discuss their plans to kill a member of the victim's gang in retaliation for an earlier shooting. On June 4th, the night the shooting, Quezada testified that he accompanied petitioner and Matos to DeArco's Pizzeria, and spotted some rival gang members inside. Petitioner told Quezada to watch for police. Quezada then testified that he saw petitioner hand Matos a gun and the two entered the restaurant. A few minutes later he heard shots and ran away. Quezada also testified that he saw Matos a few days after the shooting, and Matos bragged about shooting some rival gang members.

2. Petitioner's Defense

Petitioner's trial counsel, Thomas Brandstrader, attacked the prosecution's case primarily through cross-examination of its witnesses. Brandstrader's examinations revealed that Quezada had changed his story regarding petitioner's participation in the shooting shortly before trial. Brandstrader further revealed that Calatayud, another prosecution witness, had similarly changed her story on the eve of trial.

Additionally, Brandstrader presented an alibi defense. Brandstrader called petitioner's girlfriend, Desiree Moyet, who testified that she spent the night of June 4th with petitioner at

his mother's home in Highland Park, Illinois watching movies and eating pizza.

3. Motion for New Trial

Prior to sentencing, petitioner filed a motion for a new trial claiming that Brandstrader failed to adequately present an alibi defense or conduct a through pre-trial investigation. To support these claims, petitioner attached affidavits from seven alibi witnesses who were prepared to testify but were never called. Petitioner also presented a number of telephone records to corroborate the uncalled witnesses's testimony. The court held an evidentiary hearing and the following evidence was adduced.

Petitioner's mother, Maria Raygoza, testified that on June 4th, 1997, the night of shooting, she was celebrating her 40th birthday in her Highland Park, Illinois home. She explained that at around 8:00 p.m., she arrived home with her daughter, Crystal, and her friend, Chloe Gavin, and began preparing for the party. Soon afterwards, she received a telephone call from another friend, Noemi Cordova, asking for directions. Maria then claimed that she left to escort Cordova to her home. At around 9:00 p.m., Maria explained that she, Gavin, and Cordova, arrived back home and found petitioner waiting for them. Maria claims that she socialized with her friends until 10:15 p.m., and then drove petitioner and his girlfriend to Chicago. After dropping off petitioner's girlfriend, Maria claims that she and petitioner stopped at her office to retrieve some documents. While gathering the documents, Maria claims that petitioner used the office telephone to call his girlfriend, Desiree Moyet. Maria submitted telephone records, which confirm a ten minute call from Maria's office to Moyet's residence around 11:00 p.m. on June 4th.

Maria then testified that she and petitioner returned to Highland Park. Maria further testified that the next morning she drove petitioner from Highland Park to Chicago and petitioner departed her company. That evening, Maria claims that petitioner called and explained that he might get blamed for a shooting.

Maria's friend, Noemi Cordova, testified next. Cordova claimed that she was invited to celebrate Maria's birthday and got lost driving. Cordova then testified that she called the Raygoza residence for directions and petitioner answered. Cordova submitted telephone records that show a telephone call placed from Cordova's cellular phone to petitioner's Highland Park home on June 4th at around 8:00 p.m. Cordova also testified that she saw petitioner when she arrived with Maria. Cordova explained that petitioner and his girlfriend spent the evening watching movies and eating pizza. On cross-examination, however, Cordova admitted that she did not initially want to get involved in the case, but later changed her mind.

Louis Paredes, Cordova's fourteen year-old son, also testified. He claimed that he was with Cordova that evening, and corroborated the major events she described, including seeing petitioner at the Highland Park home.

Petitioner's two siblings, Vincent and Crystal, who were fifteen years-old and thirteen years-old at the time, similarly testified to seeing petitioner at home the evening of June 4th, and both saw him leave the house with Maria around 10:00 p.m.

Petitioner also called Maria's employer, Wendy Morgan. Morgan testified that she called Maria's home on the evening of June 4th, at about 9:15 p.m., and petitioner answered the phone. Morgan introduced a telephone record that shows a

twenty-three minute phone call from Morgan's home to petitioner's home beginning at 9:15 p.m.

Petitioner next called Morgan's husband, Rodney Adams, who claims to have overhead his wife's conversation with petitioner, as Morgan was talking through a speaker-phone located in the couple's bathroom.

Petitioner further offered the testimony of two witnesses who were on the southwest side of Chicago the evening of the shooting. Both these witnesses went to a party that petitioner was apparently attending. Christina Cortes, testified that she was that [sic] the party from 2:30 p.m. to 11:00 p.m., but did not see petitioner there or anywhere in the neighborhood. Another witness, Teena Rodriguez, similarly testified that she did not see petitioner at the party, but later, on cross-examination, admitted that she had left the party prior to 6:00 p.m., and that she did not know whether petitioner showed up after she left.

The State also called a number of witnesses at the hearing. The most important witness was Brandstrader, who provided explanations for not calling each of petitioner's alibi witnesses. Brandstrader explained that he chose to present petitioner's alibi through only one witness, Moyet, because the other witnesses had credibility problems or were otherwise impeachable.

At the conclusion of the hearing, the trial court found that Brandstrader presented reasonable strategic reasons for not presenting petitioner's proposed alibi witnesses, and found nothing deficient with petitioner's representation at trial. After the court imposed sentence, petitioner timely appealed to the Illinois Appellate Court, which affirmed the trial court's decision. Petitioner then sought relief in the Illinois Supreme

Court, and the court denied review. Having exhausted his state court remedies, petitioner filed the present petition.

II. HABEAS CLAIMS

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petitioner is not entitled to a writ of habeas corpus unless the challenged state court decision is either "contrary to" or "an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor,* 529 U.S. 362, 404-05, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "contrary to" clearly established Supreme Court law "if the state court arrives at a conclusion opposite to that reached by the Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams,* 529 U.S. at 404, 120 S.Ct. 1495. To demonstrate an "unreasonable application" of clearly established federal law, a habeas petitioner must establish that the state court unreasonably applied the controlling legal rule to the facts of the case. *Id.* at 407, 120 S.Ct. 1495. Moreover, the state court's application of Supreme Court precedent must be more than incorrect or erroneous. Rather, it must be "objectively" unreasonable. *Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 1174, 155 L.Ed.2d 144 (2003); *Hardaway v. Young,* 302 F.3d 757, 762 (7th Cir.2002)(state court decision must lie "well outside the boundaries of permissible differences of opinion").

In addition, before a federal court will consider a habeas corpus petition, a petitioner must satisfy several procedural requirements. First, a petitioner must exhaust state remedies – that is, the petitioner must give the state's highest court an opportunity to address each claim. *O'Sullivan v. Boerckel,* 526

U.S. 838, 839, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). To satisfy this requirement, a petitioner must fairly present to the state judiciary both the operative facts and legal principles that control each claim. *Wilson v. Briley,* 243 F.3d 325, 327 (7th Cir. 2001). A petitioner's failure to fairly present each habeas claim to the state's highest court leads to a default of the claim, thus barring the federal court from reviewing the claim's merits. *Boerckel,* 526 U.S. at 848, 119 S.Ct. 1728. A federal court, however, may excuse a procedural default if a petitioner can show either cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

A. Procedurally Defaulted Claims

The State argues that petitioner procedurally defaulted a number of his claims because he failed to present them in his petition to the Illinois Supreme Court. Petitioner disagrees, and claims that he has diligently pursued all aspects of his Sixth Amendment Claim to the state's highest court. Alternatively, petitioner argues that even if he failed to raise certain claims, this court should excuse his default, because to do otherwise would result in a fundamental miscarriage of justice.

Petitioner's Sixth Amendment claims divide into three categories. Petitioner first presents a number claims regarding Brandstrader's failure assert his alibi defense. These claims include Brandstrader's failure to interview or present known alibi witnesses, and Brandstrader's failure to introduce certain physical evidence, namely telephone records, to corroborate the witnesses' testimony. Petitioner's second set of claims regard specific deficiencies in Brandstrader's pre-trial investigation. These claims include Brandstrader's failure to interview the

State's eye-witnesses before trial, and Brandstrader's failure to uncover the real shooter's identity which, petitioner claims, a proper pre-trial investigation would have revealed. Petitioner's final claim criticizes Brandstrader's cross-examination of a prosecution witness, Jennifer Calatayud.

Petitioner's first set of claims, the alibi-related claims, were fully and fairly presented in state court. In petitioner's submissions to the Illinois Appellate Court, he describes Brandstrader's failure to call alibi witnesses and present corroborating physical evidence with appropriate citations to relevant authority, including *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner's brief to the Illinois Supreme Court again raised Brandstrader's failure to sufficiently present his alibi defense. Although this later presentation is not as well-supported as petitioner's appellate court submissions, it nevertheless satisfies the presentment requirements sufficient to avoid default. Petitioner's Illinois Supreme Court petition offers detailed factual summaries of the witnesses' testimony and numerous citations to relevant authority. Thus, petitioner has presented both the "operative facts" and the "controlling legal principles" on which his claim was based. *See Sweeney v. Carter,* 361 F.3d 327, 333 (7th Cir. 2004) (finding that a petitioner fairly presents his federal claim to the state court when he articulates both the operative facts and the controlling legal principles on which his claim is based).

In contrast, petitioner's second set of claims, those related to Brandstrader's pre-trial investigation, were not fully and fairly presented to the state's highest court. First, petitioner's claim that Brandstrader failed to interview eye-witnesses before trial was not properly raised in either his brief to the Illinois Appellate Court or his petition to the Illinois Supreme Court. Petitioner cites page twenty-four (24) of his appellate court

brief as proof that he presented this particular claim to the state appellate court. However, this page contains only the following sentence "[Brandstrader] conceded, however, that he never even attempted to interview any of the three eyewitnesses who had identified his client." *Ill App. Br.* at 24. This statement is not followed by citation to any relevant authority, or legal argumentation on how this investigative failure constituted deficient performance. But even if the court were to find petitioner's presentation adequate, the claim would still be defaulted because his petition to the Illinois Supreme Court contains no reference to the claim whatever. Thus, because petitioner made no attempt to present his claim to the state's highest court, the claim is procedurally defaulted. *Boerckel,* 526 U.S. at 848, 119 S.Ct. 1728.

Petitioner's next claim in this second category is that Brandstrader's inadequate pre-trial investigation caused him to fail to discover the true shooter, who he maintains was fellow gang-member Eduardo Lerma. Petitioner raised this claim in his appellate brief, and the Illinois Appellate Court briefly addressed the issue. *Ill.App.Ct.* at 34-35. But petitioner's Illinois Supreme Court petition abandons any meaningful pursuit of the claim. The only mention is a one-line statement on page nineteen (19) of petitioner's petition stating that had Brandstrader presented evidence regarding this individual's identity, petitioner would have been acquitted. *Ill. Sup.Ct. Pet.* at 19. This is not a full and fair presentment of a federal claim. Petitioner's passing reference is not supported by citations to relevant authority and contains no legal argument to reveal the claim's constitutional underpinnings. *See Momient-El v. DeTella,* 118 F.3d 535, 539 (7th Cir. 1997)("the legal basis upon which a petitioner seeks relief must be fairly presented to the court").

But even if the court were to overlook his procedural default, petitioner has failed to demonstrate that the Illinois Appellate Court, in discussing this particular claim, applied *Strickland* to the facts of his case in an objectively unreasonable fashion. The cornerstone of petitioner's evidence supporting his claim is the testimony of David Torrent, a fellow gang member who testified in the proceedings of petitioner's co-defendant, Matos. In that case, Torrent explained that just before the shooting he saw Lerma walking towards the pizzeria and then heard shots. Torrent also testified that he believed Lerma had a motive for shooting the victims. Further questioning revealed that Lerma never contacted the police, states' attorney, or petitioner's or Matos's attorneys with this information even though he knew petitioner and Matos were being charged with the offense. Torrent was also impeached with several felony convictions.

Petitioner has not explained how this testimony would have altered the trial court's determination in any way, nor can this court see how its absence prejudiced petitioner. In fact, the Illinois Appellate Court noted that the trial court made specific findings that Torrent was not a credible witness and that Torrent's physical description of Lerma conflicted with the State's eye-witness descriptions of petitioner. *Ill.App.Ct.* at 35. Petitioner has not persuaded this court that Torrent's testimony was so crucial to petitioner's defense that Brandstrader was constitutionally ineffective for not calling him as a defense witness. In fact, petitioner has not demonstrated that Brandstrader even knew, or should have known, of Torrent's existence before trial. As such, Brandstrader cannot be found constitutionally ineffective for not investigating and presenting Torrent's testimony.

Petitioner's final claim regards the allegedly deficient cross-examination of a prosecution witnesses, Jennifer Calatayud. This particular claim was fully presented in his state

appellate brief and then raised again in his petition to the Illinois Supreme Court. Because petitioner raised the issue at each and every state court level, the court may address the claim's merits.

To summarize, the court finds that those claims regarding Brandstrader's failure to interview eye-witnesses, and failure to identify the "true" shooter's identify are procedurally defaulted. All others are preserved for review.

Before turning to the merits of petitioner's non-defaulted habeas claims, the court must consider whether to excuse any of petitioner's procedural defaults. It is well established that a procedural default will be excused if the petitioner can establish either "cause and prejudice" for the default, or that a fundamental miscarriage of justice would result if the claim were not considered. *Coleman,* 501 U.S. 722 at 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Petitioner does not argue "cause and prejudice," but rather argues that a fundamental miscarriage of justice would result if this court did not consider each and every one of his Sixth Amendment claims. The miscarriage of justice exception applies to the "extremely rare" and "extraordinary case" where a petitioner is *actually innocent* of the crime for which he is imprisoned. *Schlup v. Delo,* 513 U.S. 298, 321, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (emphasis added); *see also Calderon v. Thompson,* 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) ("Given the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected."). To prove actual innocence the petitioner must come forward with "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup,* 513 U.S. at 324, 115 S.Ct. 851. The petitioner

must also establish that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327, 115 S.Ct. 851.

To meet this stringent standard, petitioner claims that had a reasonable trier of fact heard the omitted evidence, namely the alibi testimony and corroborating phone records and evidence regarding the "true" killer's identity, he probably would have been acquitted. Other than this conclusory statement, petitioner makes no attempt to bolster his claim of actual innocence with any new evidence, reliable or otherwise. Petitioner's efforts fall considerably short of the "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" required to demonstrate actual innocence. *Id.* Thus, the miscarriage of justice exception cannot revive his defaulted claims.

The court now turns to the merits of petitioner's remaining habeas claims.

B. Non-Defaulted Habeas Claims

Petitioner's surviving claims regard Brandstrader's presentation of his alibi defense, and Brandstrader's allegedly ineffective cross-examination of a prosecution witnesses. Petitioner argues that these errors deprived him of his Sixth Amendment right to the effective assistance of counsel.

1. Failure to Present an Alibi

Petitioner argues that Brandstrader was constitutionally deficient because he failed to interview and/or present seven of eight available alibi witnesses. Relatedly, petitioner argues that Brandstrader was also deficient for not presenting certain physical evidence, namely telephone records, to corroborate his

alibi. The Illinois Appellate Court thoroughly considered the merits of this claim, and concluded that Brandstrader's performance was not unreasonable under the standards set forth by the United States Supreme Court in *Strickland v. Washington.* To reach its conclusion, the state court systematically considered the testimony of each potential alibi witness petitioner presented at the hearing on his motion for a new trial. In each case, the appellate court deferred to Brandstrader's articulated strategic reasons for not calling the witnesses. The appellate court also distinguished a number of state and federal decisions purportedly supporting petitioner's position, and ultimately concluded that petitioner had not demonstrated deficient performance. *Ill.App.Ct.* at 29, 35-36.

Before addressing the appellate court's decision, it is necessary to re-emphasize the standards under which the court must consider petitioner's claims. The AEDPA mandates that district courts defer to the conclusions of state tribunals, unless the relevant state court decision was either "contrary to" or involved "an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1). To consider a claim in this manner necessarily contemplates a significant degree of deference. *Williams,* 529 U.S. at 410-412, 120 S.Ct. 1495. Moreover, the specific instance of a Sixth Amendment claim alleging ineffectiveness of counsel mandates even greater deference to state court conclusions. This is because under Section 2254 it is not enough to convince a federal habeas court that, in its independent judgment, the state court decision assessed counsel's performance incorrectly. *Id.* at 411, 120 S.Ct. 1495. Rather, the habeas petitioner must show that the state court performed its analysis in an *objectively unreasonable manner. Bell v. Cone,* 535 U.S. 685, 699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)(emphasis added); *see also United States v. Pierson,* 267 F.3d 544, 557 (7th Cir. 2001)(noting that AEDPA provides for clear error review of state court *Strickland*

adjudications because of the inherent "element of deference to counsel's choices in conducting the litigation" in combination with the "layer of respect" added by 28 U.S.C. § 2254(d)(1))(internal citations omitted)).

Moreover, the presentation of an alibi defense necessarily requires counsel to make numerous decisions regarding which witnesses to interview and present to the factfinder. If those decisions can reasonably be deemed strategic, such decisions "are virtually unchallengeable." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 (holding that counsel's strategic decisions should be afforded wide latitude). Consequently, courts engage in a strong presumption that counsel performed adequately. *Williams v. Washington,* 59 F.3d 673, 679 (7th Cir. 1995). But simply calling a decision "strategic" does not insulate the decision from review. Rather, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052. With these standard in mind, the court turns to petitioner's first claim.

a. The Children

Petitioner argues that Brandstrader should have called the three children allegedly present in petitioner's home the night of the shooting. Petitioner also argues that not only did Brandstrader fail to call these children as alibi witnesses, but he also failed to interview them before trial. The Illinois Appellate Court considered petitioner's arguments and concluded that Brandstrader's reasons for not using the children were strategic. The court explained that during the hearing on petitioner's motion for a new trial, Brandstrader testified that he had adult witnesses who would have offered the same testimony, and that he believed the children's testimony would have added little, if

anything, to petitioner's alibi defense. Moreover, the court noted that two of three children were petitioner's siblings, and therefore exhibited an inherent familial bias. The court therefore labeled Brandstrader's reasons not to investigate and present the children as strategic, and concluded that his performance did not fall below *Strickland's* standards. *Ill.App.Ct.* at 28-29. This was not an objectively unreasonable application of *Strickland.*

While it is true that an attorney must engage in a reasonable amount of pretrial investigation, counsel is also permitted to make rational decisions that make particular investigations unnecessary. *Crisp v. Duckworth,* 743 F.2d 580, 583-84 (7th Cir. 1984). Here, Brandstrader offered arguably plausible strategic reasons for not interviewing the children. Perhaps an ideal defense counsel might have made the effort to determine, through a personal interview, that the children's testimony would have been merely cumulative, but *Strickland* does not necessarily require such effort. *See Sullivan v. Fairman,* 819 F.2d 1382, 1392 (7th Cir. 1987) (defense counsel does not have to "track down every lead" or "personally investigate every evidentiary possibility before choosing a defense and developing it."). Although this court might have concluded otherwise, Brandstrader has articulated a number of reasonable strategic reasons why in his professional judgment he believed the children's testimony was not essential to petitioner's alibi defense, this court cannot say that the state court's decision applying *Strickland* was objectively unreasonable.

b. Maria Raygoza

Brandstrader also decided not to call petitioner's mother, Maria Raygoza, as an alibi witness. Petitioner argues that this decision clearly demonstrates deficient performance, because Maria could have testified to numerous facts supporting

petitioner's alibi, including petitioner's attendance at her 40th birthday party the evening of the shooting and the telephone call to Moyet's home from Maria's office shortly after the murder. The state court disagreed that Maria was an essential alibi witness, and credited Brandstrader's strategic reasons for not presenting her testimony. The state court noted that Maria had testified earlier (during a hearing on petitioner's motion to suppress his confession) that petitioner had called her the day after the shooting explaining that he might get blamed for murder. The court explained that Brandstrader legitimately feared that this testimony, if brought out through cross-examination, would damage petitioner's case. *Ill.App.Ct.* at 32 (finding that petitioner's phone call "appears to be incriminating in nature and one that a competent attorney would not want before the trier of fact."). The court also defended Brandstrader's reasons for not calling Maria by explaining that she was his mother, and would therefore exhibit an obvious filial bias. Perhaps most important, the appellate court relied heavily on the trial court's factual finding, which petitioner does not now challenge, that Brandstrader met with Maria "30 times" before trial, and throughly investigated the possibility of using her to bolster petitioner's alibi. *Id.* at 28. In the end, Brandstrader determined that she would not make a good witness, and the state court deferred to this strategic decision. *Id.* at 28. This conclusion was not objectively unreasonable.

Brandstrader articulated a number of strategic reasons for not calling Maria, all of which could fairly be deemed a reasonable exercise of professional judgment. This is not a case where counsel has failed to investigate a potential lead, or has neglected his pre-trial duties to develop a viable defense theory. As found by the state court, Brandstrader met with Maria 30 times prior to trial, and it is not for this court to second guess Brandstrader's informed decision to keep her off the witness stand. Moreover, Brandstrader explained that Maria might

reveal potentially incriminating information which, on balance, could have hurt his client. An attorney's decision not to present a particular witness "can be strategically sound if based on the attorney's determination that the testimony the witness might give would on balance harm rather than help his client." *Hall v. Washington,* 106 F.3d 742, 749 (7th Cir. 1997). Again, although this court might have reached a different conclusion, because Brandstrader was able to articulate reasonable strategic reasons for not calling Maria, the court cannot find that the appellate court unreasonably applied *Strickland* to the facts of this case.

c. Noemi Cordova

Petitioner argues that Brandstrader should also have called Maria's friend, Noemi Cordova, because Cordova could have confirmed that petitioner was in Highland Park the night of the murder. The appellate court considered this argument and once again deferred to Brandstrader's articulated strategic reasons for not calling Cordova. At the hearing on petitioner's motion for a new trial, Brandstrader testified that Cordova was a particularly uncooperative witness, who repeatedly expressed reluctance about being used as an alibi witness. Brandstrader further testified that when she finally agreed to testify, it took his investigator three days to track her down. Lastly, Brandstrader explained that Cordova failed to show up at trial at the appointed time, and Brandstrader did not locate her until after the trial had concluded. The trial court found Brandstrader's testimony credible, and the appellate court found no reason to overturn the lower court's finding. This permitted the court to conclude that Brandstrader's reasons for not calling Cordova were strategic and reasonable. *Ill.App.Ct.* at 28. This was not an objectively unreasonable application of *Strickland.*

If, as the state court chose to believe, Ms. Cordova was not cooperating, then a prudent defense counsel might well be correct to exercise caution before relying on such a witness. Petitioner, however, urges this court to disregard Brandstrader's testimony that Ms. Cordova was uncooperative because, he claims, the record does not support Brandstrader's allegations. But this argument misunderstands the posture of this court's review. The state court found Brandstrader's testimony credible, and made certain and definite findings in this regard that petitioner makes no attempt to challenge. Simply by asking this court to disregard the state court's findings misapprehends the deference that this court must extend to state court factual findings. *See Harding v. Walls,* 300 F.3d 824, 828 (7th Cir. 2002) ("[R]elief may be had where the petitioner can show by clear and convincing evidence that the state court's factual determinations were unreasonable."). Because the state court found that Brandstrader's decision not to call Cordova was based on reasonable strategic decisions, and petitioner has not demonstrated the unreasonableness of this conclusion, this court cannot find that the Illinois Appellate Court misapplied *Strickland* to the facts of his case.

d. Wendy Morgan and Rodney Adams

Petitioner further claims that Brandstrader should have called Wendy Morgan and her husband, Rodney Adams, because both heard petitioner's voice over the telephone when they called his Highland Park home on the night of the murder. In reviewing this argument, the Illinois Appellate Court began by noting that Brandstrader had met with Morgan and Adams at least twice, understood their potential use as alibi witnesses, and ultimately concluded that their testimony would prove unhelpful. Additionally, the court credited Brandstrader's stated reasons on which he based his decision, which included inconsistencies in Morgan's and Adams' testimony, their alleged reaction of

relief when Morgan learned of Brandstrader's decision not to call her, the fact that Morgan had lied to him about how she came to learn about murder, and, most importantly, that Morgan never saw petitioner the night of murder, but claims only to have spoken to him briefly on the telephone.[2] The state court determined that Brandstrader's reasons were strategic in nature, and the result of an adequate investigation into their value as alibi witnesses. As such, the court found that Brandstrader's decision not to present Morgan and Adams' testimony did not violate *Strickland's* performance standards. *Ill.App.Ct.* at 28.

Although this court is troubled by Brandstrader's professed reason for not calling Morgan and Adams, the court cannot find the state court's decision objectively unreasonable. It appears that these witnesses could have put petitioner in Highland Park shortly before the murder on the southwest side of Chicago. Again, however, the state court considered the evidence and applied *Strickland* in a manner that cannot be second-guessed by a federal habeas court.

e. Failure to Present Telephone Records

Petitioner also claims that Brandstrader acted unreasonably in failing to present telephone records to corroborate his alibi. In addressing this claim, the state court identified three sets of telephone records. These included records from: 1) Morgan's home to petitioner's home; 2) Cordova's cellular phone to petitioner's home; and 3) Maria's office to petitioner's girlfriend's home. Petitioner argues that these telephone

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[2] Morgan's husband, Adams, did not even speak to petitioner, but only overheard his wife's conversation on a speaker phone.

records significantly corroborated his alibi. In discussing this claim, the Illinois Appellate Court first observed that the telephone records do not reflect who made the calls or who answered them. The court also noted that the records do not establish that petitioner took part in any of the calls. And perhaps most important, the court reasoned that even if the telephone records corroborated the witnesses' testimony, such corroboration did little to impact the validity of Brandstrader's strategic choices not to call the witnesses in the first place. Based on these observations, the court concluded that Brandstrader's failure to produce the telephone records did not violate *Strickland's* performance standard. *Ill.App.Ct.* at 30. This finding is not objectively unreasonable.

The appellate court provided logical reasons for its conclusion regarding Brandstrader's decision not to introduce the telephone records. Given the high level of deference mandated by *Strickland* to Brandstrader's choices, petitioner has not persuaded the court that habeas relief is warranted here. That said, the court notes that the call made from Maria's office to petitioner's girlfriend's house only a few hours after the shooting might have supported petitioner's alibi.[3] Despite this observation, the court cannot say that this single telephone call represents such an obvious piece of exculpatory evidence as to render the state court's application of *Strickland* objectively unreasonable. Petitioner had an opportunity to convince the trier of fact, and the court on appeal, that the referenced phone call was so important to petitioner's alibi that Brandstrader was ineffective by not presenting the evidence. He did not. And so long as the appellate court's conclusions in this regard are at

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[3] The State, however, argues that Maria Raygoza did not inform Brandstrader about this phone call until after trial. If true, this could explain Brandstrader's failure to present the information at trial.

least minimally consistent with the facts and circumstances of the case, which this court has concluded they are, relief must be denied. *See Schaff v. Snyder,* 190 F.3d 513, 523 (7th Cir. 1999)(finding that a court should uphold a state court decision that are "minimally consistent with the facts and circumstances of the case").

f. Brandstrader's Refusal to Present an Alibi Defense

Petitioner also argues that Brandstrader refused to cooperate in formulating his alibi defense. In support of this argument, petitioner submits a letter that Brandstrader wrote his mother, Maria Raygoza, shortly before trial that states, "alibis don't work." The letter also describes Brandstrader's specific concerns regarding the credibility of petitioner's proposed alibi witnesses, and sets forth Brandstrader's trial strategy, which was to attack the State's eye-witnesses through vigorous cross-examination. Petitioner claims that the letter reveals Brandstrader's refusal to seriously consider petitioner's alibi defense. The Illinois Appellate Court addressed this argument and noted that, contrary to petitioner's assertions, Brandstrader did in fact put on an alibi defense. The court explained that petitioner's girlfriend, Moyet, testified as an alibi witness and offered an alternative version of the evening's events, which placed petitioner in Highland Park celebrating his mother's 40th birthday. *Ill.App.Ct.* at 33. ("We find that the record as a whole reflects that Brandstrader did not reject an alibi defense as 'out-of-hand.' Instead he made a decision to present what he thought to be the best alibi witness while declining to put other potential alibi witnesses on for stated strategic reasons."). The court also determined that petitioner overstated the significance of Brandstrader's letter, particularly Brandstrader's remark that "alibi's don't work," and noted that Brandstrader undertook an adequate investigation of a petitioner's proposed alibi, despite any bias Brandstrader might have harbored against alibis in

general. The court therefore concluded that because Brandstrader worked with petitioner to formulate an alibi defense, and made reasonable efforts to present such a defense before the trier of fact, Brandstrader's performance did not fall below *Strickland's* standards. *Id.* at 32-33. This was not an objectively unreasonable application of *Strickland.*

This is not a case where counsel has completely failed to put on an alibi defense, were a viable alibi was available. The trial court found that Brandstrader met with Maria Raygoza some 30 times prior to trial and also interviewed other potential alibi witnesses. After making what the state court determined were reasonable strategic decisions, Brandstrader decided that petitioner's alibi was unconvincing, but nevertheless attempted to present such a defense before the trier of fact. Despite this, petitioner argues that Brandstrader's failure to investigate prevented him from discovering the most basic and essential facts of his alibi. This argument is unpersuasive for two reasons. First, it is contrary to the appellate court's determination that "Brandstrader demonstrated, through his testimony, that he knew a great deal about the alibi defense." *Id.* at 31. Second, by labeling the omitted facts as "basic" and "essential," petitioner asks this court to assume that such facts were *true.* Put another way, the omitted facts become "essential" to petitioner's alibi only if they are, in fact, believable. But other than a general rehashing of testimony, petitioner offers little argument to demonstrate the witnesses' veracity.

Moreover, to assume that the witnesses's testimony was all true contradicts many of the trial court's factual findings regarding the witnesses' credibility, which are presumed correct for purposes of this court's review. *See Ellsworth v. Levenhagen,* 248 F.3d 634, 638 (7th Cir. 2001) ("[S]tate court factual findings that are reasonably based on the record are accorded a

presumption of correctness."). Accordingly, Brandstrader cannot be deemed incompetent for failing to fully investigate an alibi that Brandstrader, in the exercise of his professional judgment, determined to be less than convincing. For these reasons, petitioner has not demonstrated that the Illinois Appellate Court applied *Strickland* in an objectively unreasonable fashion.

g. Relevant Authority

Lastly, it is necessary to distinguish a number of authorities that petitioner claims support his position. Petitioner relies heavily on *Hampton v. Leibach,* 347 F.3d 219 (7th Cir. 2003), for the proposition that failure to investigate potentially exculpatory alibi witnesses constitutes ineffective assistance of counsel. Petitioner's reliance on *Hampton* overlooks a critical distinction between this case and *Hampton.* In *Hampton,* the district court had conducted a *full evidentiary hearing* regarding counsel's purported strategic reasons failing to contact three exculpatory eye-witnesses. At the conclusion of the hearing, the court made a number of findings discrediting counsel's testimony. These determinations were essential to the court's finding of ineffective assistance. Unlike the district court in *Hampton,* this court does not have the same latitude to assess Brandstrader's credibility regarding his stated reasons for not using various witnesses. That task was already performed by the state trial court, and affirmed by the Illinois Appellate Court. AEDPA mandates that absent "clear and convincing evidence" of unreasonableness this court cannot disturb the state court's findings. *See* 28 U.S.C. § 2254(e)(1); *Harding,* 300 F.3d at 828. Because petitioner does not offer any such evidence, *Hampton's* conclusions are, for the most part, inapplicable here.

Petitioner also claims that *Montgomery v. Petersen,* 846 F.2d 407 (7th Cir. 1988), supports his claim. In *Montgomery,* the court noted that Brandstrader's investigative failures were not related in any way to trial tactics or strategy, but were the result of serious errors in professional judgment. In fact, the petitioner's counsel admitted on examination that his reasons for not following critical leads stemmed from "inadvertence" and "disbelief of [the defendant]" rather than strategy. *Id.* at 411. Additionally, in *Montgomery* the court found that trial counsel failed to interview the only available *disinterested* alibi witness, and the remaining uncalled alibi witnesses were unimpeachable. *Id.* In contrast, Brandstrader lacked a genuinely disinterested alibi witness (all the potential witnesses were either friends or close family), and the state court determined that a number of his witnesses were, in fact, impeachable. These distinctions render *Montgomery* inapplicable here.

Finally, petitioner claims that this court's decision in *Berry v. Bramley,* 74 F.Supp.2d 808 (N.D. Ill. 1999), compels a decision in his favor. But *Berry* is easily distinguishable. In *Berry,* this court, after holding an evidentiary hearing, found counsel's performance deficient because he neglected to interview an exculpatory *eye-witness* to the crime. Here, the omitted testimony was from *alibi* witnesses. The distinction is not altogether unimportant because, in *Berry,* the uncalled eye-witness, as a witness to the crime itself, contradicted the State's case, whereas petitioner's alibi witnesses would not have directly challenged the State's primary evidence. Moreover, the credibility of the uncalled eye-witness in *Berry* was never placed in doubt, whereas the credibility of petitioner's alibi witnesses was repeatedly questioned. But most important, in *Berry* this court determined that counsel had engaged in virtually no pre-trial preparation, had spoken to his client on only two occasions, did not understand his client's

theory of the case, made no attempt to present exculpatory evidence, and committed perjury to the state court and the Illinois Attorney Registration and Disciplinary Commission. Brandstrader's behavior in the instant case, thankfully, does not even come close to the incompetence and duplicity of counsel in *Berry*.

In sum, petitioner has failed to adduce any argument to show that the Illinois Appellate Court unreasonably applied *Strickland* to the facts of his case. Accordingly, petitioner's claim regarding Brandstrader's failure to present an alibi defense must fail.[4]

2. Failure to Cross-Examine State Witness

Petitioner's final claim is that Brandstrader failed to properly cross-examine one of the prosecution's witnesses, Jennifer Calatayud. As explained previously, Calatayud testified that she saw petitioner and co-defendant Matos outside a party on the southwest side of Chicago just before the shooting. On cross-examination, Brandstrader elicited that Calatayud had changed her story regarding petitioner's whereabouts a few months prior to trial. Petitioner now claims that while Brandstrader's cross-examination managed to reveal this inconsistency, it did not place her testimony in sufficient doubt so as to completely undermine her credibility. Petitioner further claims that Brandstrader should have called other witnesses,

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[4] Because petitioner has not demonstrated a deficiency in Brandstrader's performance, his claim does not clear the first hurdle of the *Strickland* test, and the court has no occasion to address the prejudice prong. *See Hough v. Anderson*, 272 F.3d 878, 890 (7th Cir. 2001)(failure to establish either prong is fatal to an ineffective assistance of counsel claim).

namely Teena Rodriguez and Christina Cortes, who could have further contradicted Calatayud's testimony.

The Illinois Appellate Court considered this claim and found that Brandstrader performed within *Strickland's* performance standards. The court noted that in addition to revealing that Calatayud had changed her story, Brandstrader also asked the court to not consider her testimony against petitioner. The court further found that Brandstrader emphasized Calatayud's inconsistent statements during closing arguments. Based on these observations, the court concluded that Brandstrader's cross examination was "[not] ineffective in any way." *Ill.App.Ct.* at 34.

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. *See, e.g., Willis v. United States,* 87 F.3d 1004, 1006 (8th Cir. 1996)("there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster."). Here, Brandstrader did ask Calatayud a few pointed questions and emphasized her inconsistencies during closing argument. Petitioner is correct that Brandstrader's examination was not particularly meaningful and thorough, but it did not render his performance so unreasonable as to constitute ineffective assistance. The failure of counsel to develop every bit of testimony through all available inconsistent statements to impeach witnesses is not necessarily unprofessional or ineffective assistance of counsel, particularly where a petitioner was not prejudiced as a result of the alleged errors. *Poyner v. State of Iowa,* 990 F.2d 435, 438 (8th Cir. 1993). Petitioner does not explain how a more rigorous cross-examination of Calatayud would have had any effect on the outcome of the proceedings. Petitioner's related claim that he was prejudiced because Brandstrader did not call

Teena Rodriguez and Christina Cortes does not alter this conclusion. Based on the statements given at the post-trial hearing, Cortes and Rodriguez would have offered little, if anything, to contradict Calatayud's testimony. Both witnesses admitted that they could not definitively say whether petitioner was at the party where Calatayud placed petitioner on the night of the shooting.

Lastly, petitioner argues that the state court's decision regarding Brandstrader's cross-examination is contrary to the Seventh Circuit's application of *Strickland* in *Dixon v. Snyder,* 266 F.3d 693 (7th Cir. 2001). *Dixon* is distinguishable from the present case. First, Dixon's trial counsel did not even attempt to cross examine the sole direct witness against his client, who had recanted his previous testimony. *Id.* at 703. In contrast, Brandstrader cross-examined Calatayud, and brought out that she changed her story shortly before trial. Additionally, in *Dixon,* the testimony presented by the uncrossed witness offered was direct and damaging testimony regarding the defendant's participation in the crime. *Id.* at 704-05. Here, Calatayud's testimony was, at best, circumstantial, and offered little evidence regarding petitioner's actual participation in the crime itself. Petitioner's reliance on *Dixon* is therefore misplaced.

In sum, the Illinois Appellate Court determined that Brandstrader's examination, while brief, revealed the inconsistency between Calatayud's prior out-of-court statement and later trial testimony, and that Brandstrader emphasized this inconsistency to the court following his examination and during closing statement. Because petitioner has not offered anything to demonstrate that the Illinois Appellate Court's conclusions regarding Brandstrader's cross-examination of Calatayud were objectively unreasonable, his second and final claim must also fail.

III. CONCLUSION

This court is disturbed by the conduct of defense counsel Brandstrader, who appears to have failed to present an effective alibi defense at petitioner's trial. Although Brandstrader was able to identity potential flaws in the testimony of most all of the alibi witnesses taken individually, it seems to this court that presenting all the witnesses who could have established that petitioner was not at the scene of the murder when it occurred, as well as the corroborating documentary evidence, might well have had a significant impact on the outcome of the trial. Rather than being "cumulative," such a presentation would have forced the prosecution into the difficult position of attempting to prove that all of these witnesses were committing perjury. The fact that Brandstrader did not even know that all these people were at petitioner's mother's home to celebrate her birthday, and did little investigation into the circumstances surrounding petitioner's whereabouts during the evening in question, diminishes the reliability of his explanations.

Yet, despite this court's misgivings, the court concludes that it lacks the authority to second-guess the state courts that have reviewed this case and determined, after properly applying the *Strickland* standards, that Brandstrader's performance was not constitutionally ineffective. The fact that the same judge who conducted the bench trial also heard from all the alibi witnesses and Brandstrader at the post-trial proceeding lends significant weight to the conclusions reached at the state level. Moreover, no party has suggested that this court conduct an evidentiary hearing to determine whether Brandstrader had testified falsely at the post-trial proceeding; it was in connection with such an evidentiary hearing that the perjury of defense counsel in *Berry* was exposed. *Berry*, 74 F.Supp.2d at 816-17. Finally, Brandstrader's continuous refusal to present the alibi witnesses demanded by petitioner and his family was known to them

sufficiently in advance of trial to have allowed them ample time to seek to replace him. The record simply does not support substituting this court's judgment for that of the state courts that thoroughly reviewed and ultimately rejected petitioner's position.

For the reasons stated above, the court denies the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case is terminated and any pending motions are denied as moot. The court wishes to express its appreciation to petitioner's counsel, Leonard C. Goodman and Lawrence C. Marshall, for their commendable efforts on behalf of Mr. Raygoza, and to all counsel for prosecuting this challenging case in a highly professional and thorough manner.

ENTER: March 23, 2005.

Robert W. Gettleman
United States District Judge

United States District Court
Northern District of Illinois
Eastern Division

USA ex rel Christopher Raygoza

v. Case Number: 03 C 1727

Jerry Bohler, Warden

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that petitioner's motion to reconsider order denying petition for writ of habeas corpus, motion to stay the judgment and request for evidentiary hearing is denied.

Michael W. Dobbins, Clerk of the Court

Date: 4/20/2005 /s/ George D. Schwemin, Deputy Clerk

United States District Court
Northern District of Illinois

U.S.A. ex rel. Christopher Raygoza

v. No. 03 C 1727

Jerry Bohler, Warden Judge Robert W. Gettleman

Petitioner's motion to reconsider order denying petition for writ of habeas corpus, motion to stay the judgment and request for evidentiary hearing are denied.

Dated: 4/20/2005

People v. Raygoza

Ill. 2002.
(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Christopher Raygoza

NO. 92723

JANUARY TERM, 2002
February 06, 2002

Lower Court: No. 1-99-4452

Disposition: Denied.

Ill. 2002.
People v. Raygoza
198 Ill.2d 604, 766 N.E.2d 243 (Table), 262 Ill.Dec. 623

SECOND DIVISION
September 28, 2001

No. 1-99-4452

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County
v.	)	No. 97 CR 18939
CHRISTOPHER RAYGOZA,	)	Honorable Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Following a bench trial, defendant Christopher Raygoza was found guilty of first degree murder and attempted murder. Defendant subsequently obtained new counsel and alleged, in an amended motion for a new trial, that he had received ineffective assistance of counsel at trial. Following an extensive evidentiary hearing, the trial court denied the motion for a new trial. Defendant was then sentenced to consecutive terms of 30 and 15 years in prison. Defendant now appeals, contending that he was deprived of his constitutional right to effective assistance of counsel at trial and was denied his due process right to a fair and impartial evidentiary hearing on his motion for a new trial.

On June 4, 1997, at approximately 9:45 p.m., Miguel Macias and Hugo Munoz were shot in DeArco's Pizzeria on the southwest side of Chicago. Macias died as a result of the shooting. Defendant and co-defendant Leslie Matos were later identified in photographic arrays and line-ups as having been involved in the shooting. Defendant and Matos were arrested and charged with a number of offenses, including first degree murder and attempted murder. Defendant's mother, Maria Raygoza (Maria), retained attorney Thomas Brandstrader to defend her son against the charges.

Prior to trial, Brandstrader filed a motion to suppress defendant's written confession to police in which defendant implicated himself in the shooting. Following an evidentiary hearing, defendant's confession was suppressed on the basis that it was obtained in violation of defendant's right to counsel. The court held, however, that the State could use the confession for rebuttal at trial if defendant testified.

Defendant and co-defendant Matos were tried simultaneously in severed bench trials. At trial, the following evidence was adduced regarding defendant.

John Ribota, Hugo Munoz, and Leo Dorado testified that on June 4, 1997, they were members of the United Latino Organization streetgang, also known as ULO. On that date, the three, plus Miguel Macias, were watching a Chicago Bulls game at a friend's home when they decided to go get pizza. They went to DeArco's Pizzeria (pizzeria). While they were inside the pizzeria, an individual entered the restaurant flashing gang signs and shouting ULOK, which means United Latino killer. They recognized the gang signs to be those of a rival gang known as the Latin Souls. All three identified that person as co-defendant Leslie Matos. Matos then stepped out of the pizzeria. Shortly thereafter, he reentered the pizzeria with

another individual, who the three identified at trial as defendant. Defendant pulled out a pistol, pointed it towards the ULO members and moved towards them. Matos stood in the doorway shouting "kill him, kill him, shoot him." Defendant then began to shoot. The ULO members attempted to escape out the back of the pizzeria but were unsuccessful. Hugo Munoz was shot in the right and left arms and left buttock. Miguel Macias was shot in the back. Macias later died from his injuries. Ribota, Munoz, and Dorado had not seen defendant before the day of the attack and did not know his name at that time. Two of the three identified defendant as having a blond pony-tail.

James Parker testified that he, his fiancée, and his daughter were walking past DeArco's Pizzeria at about 9:40 p.m. on June 4, 1997, when he saw two Hispanic males standing in the pizzeria doorway. Parker heard one of the men say "shoot him, shoot him, kill him." Parker then heard six or seven gun shots. The shorter of the two men was wearing a red beret with a black tassel, dark t-shirt, and baggy blue jeans. The taller one had his hair slicked back. After taking cover in a grocery store, Parker then saw the two men running away. He did not see their faces.

Jennifer Calatayud testified that on June 4, 1997, she and her friend Franchesca made plans to watch the Bulls game at the home of co-defendant Matos, who was her boyfriend at the time. She knew Matos, also known as "Shadow," and defendant, also known as "Froggy," to be members of the Latin Souls streetgang. Shortly after 8 p.m., she was driving when she saw Matos and defendant outside a party at 62nd Street and Sacramento. She spoke with Matos, who told her he had "something to do," and would meet her at his home 15 minutes later. She and her friend went to Matos home and waited for him. He arrived about an hour later. He was out of breath and told her that he had run home. After further questioning by

Calatayud, he told her that "the boys" shot somebody at the pizza place on California.

After Matos was arrested, Calatayud and Francesca were asked to give statements to the police. During their drive to the police station, Calatayud and Francesca discussed what they were going to say and, in an effort to help Matos, agreed to tell the police that Matos had left the party at 61st and Sacramento with them and the three had then gone to Matos house to watch the game. Prior to trial, Calatayud decided that she did not want to commit perjury at trial and proceeded to contact the state's attorney.

After the State completed its examination of Calatayud, the trial court asked Brandstrader, defendant's counsel, if he had any questions for her. Brandstrader asked the court not to consider Calatayud's testimony against defendant. The trial court stated that other than her testimony that she saw defendant and co-defendant Matos together on June 4, it would not consider her testimony against defendant. Brandstrader then questioned her and established that other than telling the police she knew defendant, Calatayud had not mentioned defendant to the police when she spoke with them in June, 1997. He also asked her if she had told the police in June, 1997, that she had seen defendant in front of Matos' house. She replied that defendant had not been in front of Matos house on June 4.

Raul Quezada testified that he was a member of the Latin Soul street gang in June, 1997. He had pled guilty in Juvenile Court to first degree murder and aggravated battery in the shooting at issue in this case in exchange for the State withdrawing a motion to transfer his case to adult court. He did not, at that time, have any deal or agreement with the State regarding testimony he would give at a later time. Quezada testified that in June, 1997, he had known defendant for about

three months and Matos for about one month. According to Quezada, he was in Marquette Park in Chicago with defendant, Matos, and others on May 31, 1997. Those present discussed the shooting of a member of the Latin Souls a month earlier by members of ULO. Quezada heard defendant say that they were going harm or kill a ULO as retaliation.

On June 4, 1997, Quezada saw defendant and Matos in the vicinity of 63rd Street and California at about 8 p.m. He went with defendant, Matos, and another gang member to DeArco's Pizzeria. There, they saw some people they recognized as ULOs inside. Defendant told Quezada to watch out for police. He saw defendant hand a gun to Matos. Quezada saw defendant and Matos enter the pizzeria. After two or three minutes, Quezada heard shots and ran away. He saw Matos three days later, who told him they had "shot some ULO's." Quezada identified a picture of defendant with a "gold" ponytail as being how defendant looked on June 4, 1997.

Chicago police detective Thomas Argenbright testified, upon examination by defendant's counsel, that Quezada told him he and a group of people had gone into the pizzeria, ordered pizza, and left prior to the shooting.

Over the relevance objection of defense counsel, a police officer testified that defendant and co-defendant Matos were arrested together spraying Latin Souls gang graffiti in January, 1997.

Desiree Moyet testified for defendant that she was defendant's girlfriend in June, 1997. She and her cousin Alexis went to the home of defendant and his mother on June 4, 1997. They took a Metra train there and arrived around 5:30 p.m. After arriving, they went out and rented movies. Desiree, Alexis, and defendant spent the night watching the movies in

defendant's sister's room. Defendant's brother was also in the house. Shortly before 10:15 p.m., defendant's mother arrived home. A tall woman with blond hair was also present at that time, as was defendant's sister. At 10:15 p.m., defendant's mother drove Moyet and her cousin home to Chicago. Defendant was also in the car. She got home around 10:45 p.m.

On cross-examination, Moyet testified that she did not know co-defendant and had never seen him before. She acknowledged that in June, 1997, defendant had a ponytail in his hair that was bleached blond.

After hearing the evidence, the trial court found defendant guilty of first degree murder and attempt murder. Co-defendant Matos was also found guilty of those same charges.

Defendant's trial counsel filed a motion for a new trial. At a subsequent court appearance, defendant was represented by a new attorney, who filed an amendment to the motion for new trial alleging that defendant's trial counsel had been ineffective. Attached to the motion were seven affidavits of alibi witnesses and corroborating documents.

A hearing was held on defendant's amended motion for a new trial. At the hearing, Wendy Morgan testified that she was an attorney specializing in family law. She employed defendant's mother as a paralegal. At approximately 9:15 p.m. on June 4, 1997, she placed a call to defendant's home to remind defendant's mother to pick up some documents that evening from her office. Defendant answered the telephone when she called. She knows this because she asked the person answering if it was Chris, and he said yes. She also recognized defendant's voice, having spoken to him hundreds of times in the past. They discussed defendant's pursuit of his GED, and she then asked to speak to his mother. An uncertified telephone

record was submitted into evidence showing that at 9:15 p.m. on June 4, 1997, Morgan made a 23 minute call to defendant's home. Morgan also testified that she had studied voice as a music major in college and believed she was thus more qualified than an average person to detect the particular voice of a person. She further testified that when she spoke with defendant on June 4 she was on speaker phone and that her husband, Rodney Adams, was present and heard the conversation.

Morgan testified that she had spoken to defendant's trial counsel many times during the case, had given trial counsel her telephone records, was available to testify at trial, and had expected to be called.

On cross-examination, Morgan testified that she had previously testified at defendant's bond hearing about the telephone call to defendant's home on June 4. She acknowledged that during that testimony, she had not stated that her husband heard the conversation. She acknowledged that she had testified at the bond hearing and at the hearing on defendant's motion to suppress that a woman known as Chloe Gavin was not an attorney. She acknowledged that in a December 18, 1997, pleading she had filed in a different case, she had stated that Gavin was an attorney.

Morgan acknowledged that she had contact with a Department of Defense investigator named Tom O'Connor who was investigating Chloe Gavin. Morgan was shown a document containing what the State referred to as "a script of June 4th of 1997 broken down nearly to the minute." The document had a fax cover sheet from Morgan's law office indicating that it had been sent to O'Connor from "Maria." Morgan testified that she had never seen the timeline before.

According to Morgan, trial counsel told her at a meeting just prior to trial that he was going to call her as a witness at trial. A supplemental answer to discovery filed by the State regarding prior testimony of Morgan was discussed at the meeting. Morgan believed that the supplemental answer had no merit whatsoever.

On re-direct, Morgan testified that when she first got to know Chloe Gavin in 1996, Gavin informed her that she was a former CIA agent, a colonel in the army, and had worked with the State Department. Gavin, purporting to have been sent by the State Department, later gave testimony regarding international custody disputes at a hearing for one of Morgan's clients. Gavin also became the Highland Park landlord of defendant and his mother. Morgan later learned that many of the things Gavin told her were untrue and that Gavin was stealing from Morgan's law practice. Morgan later met with Tom O'Connor who was investigating Gavin for impersonating government officials.

Cristina Cortes testified that on June 4, 1997, she attended a party at 62nd Street and Sacramento outside a home. She was at the party from 2 or 3 p.m. until about 10:30 or 11 p.m. She recalled seeing Teena Rodriguez at the party, as well as co-defendant Matos, Jennifer Calatayud, and persons known as Buster, Sleepy, Skinny, and Lucky. Lucky was wearing a maroon beret. Cortes testified that she knew defendant but did not see him at the party or in the neighborhood that afternoon or evening. She did see defendant the following day talking to somebody at 62nd and Sacramento. Cortes acknowledged that there may have been as many as 30 or 40 people at the party and that people were coming and going all day. She did not believe that Matos left the party at any point while she was there. When she left the party at 10:30 or 11, Matos walked her home. Cortes was shown a picture of Lucky, whose real name was

Eduardo Lerma. She did not remember whether Lucky had a tail when she saw him at the party. Nor did she recall if defendant had a tail in June, 1997.

Vincent Raygoza testified that he was defendant's brother and was 15 years old. Vincent recalled June 4, 1997, because it was his mother's birthday. That evening, he went to see his sister Crystal perform in a school play and then went out for pizza with his mother and her friends Noemi and Chloe Gavin. When they arrived back at their Highland Park home with pizza, defendant, Desiree Moyet, and Desiree's cousin Alexis were upstairs watching movies. Defendant later left the house with his mother to drive Desiree and Alexis home to Chicago. Although Vincent was willing to testify at his brother's trial, he never spoke to defendant's trial counsel and was never asked to testify. Vincent did not know what time they arrived home with pizza or what time defendant left for Chicago.

Crystal Raygoza testified that she was defendant's sister and was 13 years old. On June 4, 1997, she performed in a play at her school. Crystal identified an entry regarding the play in her assignment notebook. Her mother, brother Vincent, and Chloe Gavin came to watch the play, which ended at 8 p.m. When they arrived home shortly after 8 p.m., defendant, Desiree, and Alexis were at the house. Noemi Cordova arrived sometime later with her son Luis. At 10 p.m., defendant left with his mother to take Desiree and Alexis home. Although Crystal tried to tell defendant's trial counsel about the events of the evening of June 4 during the trial, he would not listen. She never showed trial counsel her assignment notebook. Crystal was present for part of the trial and sat in the courtroom with Rodney Adams.

Luis Paredes testified that he was 14 years old and that Noemi Cordova was his mother. On June 4, 1997, Luis and his

mother drove from their home in Chicago to the Raygoza home in Highland Park. They were at the house from 7 p.m. until past midnight. Luis saw defendant at the Highland Park house upstairs in a room with two girls and later on when defendant came downstairs to get pizza. Luis knew that later in the evening defendant and defendant's mother left the house. When Luis and his mother left, defendant and defendant's mother had not yet returned home. Paredes never spoke with defendant's trial counsel and was not at the courthouse during the trial. Paredes did not know if defendant had a tail on June 4, 1997.

Noemi Cordova testified that on June 4, 1997, she saw defendant at his mother's home in Highland Park. She and her son Luis went to the Raygoza's home to celebrate Maria Raygoza's birthday and to discuss a legal matter with Chloe Gavin. They got lost trying to find the Raygoza's home and Cordova made several calls to the house on her cell phone to ask for directions. Cordova's cell phone records indicated that the first telephone call took place at about 7 p.m. According to Cordova, defendant answered the telephone and told her that his mother was not home and that he did not know the way to the home. She called again at 7:47 p.m. and at 8:09 p.m. Defendant answered the telephone each time and she told him to have his mother page her when she got home. Cordova called a final time at 8:25 p.m. when Maria Raygoza paged her. after arriving at the house, Cordova went with Maria, Vincent Raygoza, and Chloe Gavin to pick up pizza. They arrived back at the house with pizza about 9 p.m. Defendant came downstairs with his girlfriends to get pizza and then went back upstairs. At 10 or 10:30 p.m., defendant left with his mother to bring the girls home while Cordova stayed to discuss a legal matter with Chloe Gavin. Cordova and her son stayed at the house until Maria and defendant returned sometime after 2 p.m.

According to Cordova, she never spoke with defendant's trial counsel. She did, however, at Maria's request, fax to defense counsel a signed statement regarding the events of June 4, 1997, that included the specific times of the telephone calls she had made to the house. Cordova testified that she was outside the courtroom on the second day of defendant's trial.

On cross-examination, Cordova denied having a December 1997, telephone conversation with defendant's trial counsel in which she told him that when defendant arrived home with his mother after 3 a.m. in the morning on June 5, his ponytail was shaved off. Cordova acknowledged telling an investigator for the State on December 2, 1997, that she did not want to testify in court because it would cause trouble to her and her family and she did not want to get involved. Cordova explained that prior to meeting with the investigator, she had received threats from unnamed people who told her that if she testified regarding what she knew and what happened on June 4, they would come and damage her family and business. When visited by an investigator for the State in 1999, she related the same information she testified to at the post-trial hearing. According to Cordova, she was, by the time of defendant's trial, willing to testify.

Rodney Adams testified that he was the husband of Wendy Morgan, who employed Maria Raygoza in her office. On the evening of June 4, 1997, he was at home when his wife made a telephone call to the Raygoza home at 9:15 p.m. Morgan made the call on speakerphone in the bathroom and Adams was also in the bathroom at that time. He heard defendant answer the telephone and then heard defendant and his wife have a conversation about how defendant was faring in the suburbs. Adams recalled that defendant was upset that Morgan was keeping defendant's mother late at work a lot of days. After 3 to 5 minutes, Morgan picked up the receiver and continued the

conversation. Adams had heard defendant's voice on a number of previous occasions.

Adams testified that he had told defendant's trial counsel on two different occasions that he had overheard the conversation and that trial counsel had informed him he did not think it was important. Adams attended defendant's trial off and on. Adams testified that he was assisting defendant's trial counsel by keeping track of witnesses so they could be there if needed to testify. During the first day of trial, defense counsel told him he would not be needed as a witness and that he wanted to call Desiree, Maria Raygoza, Wendy Morgan, and Noemi Cordova as witnesses for the defense.

Maria Raygoza testified that defendant was her son and that she was employed as a paralegal in Wendy Morgan's law office. June 4, 1997, was her 40th birthday. That day, she left work at approximately 2:40 p.m. for a meeting at her son Vincent's school. She then went home because defendant informed her that she needed to go see Crystal in a play that evening. She attended the play with Vincent and Chloe Gavin. The play ended at 8 p.m. Upon returning home, she learned that her friend Noemi Cordova was lost in the area. After getting Cordova to her home, she went with Vincent and Cordova to pick up pizzas. They arrived back at the house after 9 p.m., and defendant informed her that Morgan was on the telephone. Morgan told her that she needed to pick up some documents from the law office that evening. The people at the house included her children defendant, Vincent, and Crystal, Cordova and her son Luis, Chloe Gavin, and defendant's girlfriend Desiree and her cousin Alexis. After 10 p.m., she left the house with defendant to drive Desiree and Alexis home. After dropping off the girls, she and defendant drove to Morgan's law office, arriving after 11 p.m. While they were at the office, defendant played computer games and called

Desiree. Maria introduced a telephone record showing a call to Desiree's home from Morgan's office at 11:38 p.m. When she and defendant arrived home, Cordova and Gavin were still there with the children.

According to Maria, she spoke with defendant's trial counsel several times prior to trial. Each time she spoke with him, she gave him the same information she had just testified to. She gave him the telephone records from the law office and the names of the people who were in the house that evening. On the second day of trial, she went to court and waited outside expecting to testify. She did not know why defendant's trial counsel did not put her on to testify. At the request of defendant's post-trial counsel, she had made the drive from Highland Park to DeArco's Pizzeria at 10:30 p.m. and found that it took her one hour.

On cross-examination, Maria testified that on June 5, she went to the Daley Center for work purposes and took defendant with her. Around noon or 1 p.m., defendant left the Daley Center and went to their old neighborhood. In early evening, defendant called to advise her that there had been a shooting in their old neighborhood the night before and that there was a possibility he may be implicated. Defendant also informed her that he could not say who might blame him for the murder.

Maria acknowledged that she had met Tom O'Connor, whom she knew to be an investigator for the Department of Defense. Maria was shown a fax cover sheet that said it was from Maria to Mr. O'Connor but testified that she did not recognize the document attached to the fax cover sheet. The attached document was the timeline that included the events of June 4, 1997. Maria testified that defendant did not have a blond ponytail on June 4, 1997. According to her, he had shaved it off a few weeks prior to that date.

Teena Rodriguez testified that she was 14 years old on June 4, 1997, and was at a party outside a house around 62nd and Sacramento. She remembered seeing co-defendant Matos at the party, as well as Lucky and her friends Monica, Myra, and Christina. Lucky's real name was Eduardo Lerma. Lucky was her boyfriend at the time. Defendant was a friend of hers from the neighborhood. She did not recall seeing defendant that day and did not remember if he had a ponytail in June, 1997. Rodriguez acknowledged leaving the party prior to 6 p.m. and that she did not know if defendant was at the party after she left. After being shown a photograph of defendant with a blond ponytail, Rodriguez acknowledged that she had seen defendant with a blond ponytail in June, 1997. She viewed a picture of Lucky and acknowledged that his ponytail was black.

At the hearing on the amended motion for a new trial, defendant's counsel adopted the examination of David Torrent from co-defendant Matos' hearing on his motion for a new trial. Torrent testified that he was a member of the Latin Souls along with defendant and Matos. On June 4, 1997, at around 9:30 p.m., he was with Matos outside the pizzeria when he saw fellow gang member Lucky walking toward the restaurant. According to Torrent, Lucky had been shot by a member of the ULOs about a month earlier. Torrent and Matos had walked about a block and a half away when they heard gun shots. Torrent testified that he did not see defendant the evening of the shooting, did not know Raul Quezada, and was never contacted by the attorney for either defendant or Matos. He never contacted the police, states' attorneys, or the attorneys for defendant or Matos prior to defendant's trial with the above information. Torrent testified that Lucky had a black ponytail in June, 1997. It was also established that Torrent had several felony convictions and had visited defendant and Matos in jail on a number of occasions after their arrests.

Thomas O'Connor testified for the State that he was a criminal investigator employed by the United States Department of Defense. He began to investigate Chloe Gavin in August 1997, after being contacted by the Chicago Police concerning a document on fraudulent Department of Defense stationary. The document was found to have originated from Gavin. O'Connor was later contacted by Wendy Morgan and met with her, Rodney Adams, and Maria Raygoza at Morgan's law office. After a June 11, 1998 meeting with Morgan and Adams, O'Connor asked them to prepare a time line of the events concerning their contacts with Chloe Gavin because the information they were providing appeared to be quite convoluted. The document that Morgan subsequently provided to him included extensive information regarding the events of June 4, 1997, despite the fact that those events were of no interest to O'Connor. After reviewing the time line, O'Connor found it very incomplete and asked Morgan and Adams to prepare a more detailed time line. On June 18, 1998, his office received a new time line via a fax with a cover sheet from Maria Raygoza. The revised time line still included extensive information surrounding the events of June 4, 1997, despite O'Connor's continuing disinterest in those events. Although the presence of Gavin at the Raygoza household was of interest to O'Connor, the June 4 entry included much information of no interest to O'Connor. The time line, which was entered into evidence at the hearing, contains over 50 time entries for June 4, including details of what time defendant met Desiree Moyet and Alexis at the train station, the calls from Noemi Cordova to the Raygoza home, the telephone call from Morgan to Maria Raygoza at 9:15, a notation that defendant answered Morgan's call and that Morgan and Adams could identify his voice, a list of the people present in the Raygoza house at 9:15, and an entry noting that victim "Miguel Macias was shot and killed by Leslie Mates at DeArcos Pizzeria" at 9:43 p.m. O'Connor did not know who prepared the time lines.

Thomas Brandstrader, defendant's trial counsel, testified that he has been practicing criminal defense as a public defender and in private practice since 1981 and had handled thousands of criminal matters. He was retained to represent defendant by Maria Raygoza in September, 1997, and conferred with her approximately 30 times prior to defendant's trial. Prior to June, 1999, Brandstrader had also conferred with Morgan and Adams. On June 2, 1999, Brandstrader met with Maria Raygoza, Morgan, and Adams, in a final pre-trial meeting. When Brandstrader filed his answer to discovery, he had filed an alibi defense on the basis that defendant was in Highland Park at the time of the crime.

In his discussions with Maria Raygoza, defendant told her that he was only going to call her as an alibi witness if he absolutely had to. His "main problem" with using Maria as an alibi witness was that she had testified at the hearing on defendant's motion to suppress that defendant had called her the day after the shooting to tell her about it and that he might be blamed and that she had sought counsel for defendant that day. Brandstrader was surprised by this testimony because Maria and Morgan had both led him to believe from the beginning that the first time they had heard about the shooting was June 11. Brandstrader did not want to open Maria up to cross-examination on the statements she had made at the suppression hearing. He was also concerned because mothers are always used as alibis and are clearly biased witnesses. He testified that he did not learn Maria and defendant had stopped at Morgan's law office the night of the shooting until after trial.

At the June 2, 1999, Brandstrader also discussed with Maria calling Noemi Cordova as an alibi witness. In 1997, Maria told him that Cordova was going to call him. When she contacted him by telephone in December, 1997, she told him she had seen defendant at the Highland Park house on June 4,

1997, but could not tell him what time he had left. Cordova also told him that when defendant returned with his mother at 3 a.m. on June 5, his head was shaved. Cordova later denied that it was she who had called him. Brandstrader testified that he also saw a report from an investigator with the state's attorney and that the report stated Cordova had told the investigator she was unsure what time defendant left the Highland Park house. When shown the report at the post-trial hearing, Brandstrader acknowledged that the report did not say Cordova was unable to recall what time defendant left the house. Brandstrader had an investigator attempting to locate Cordova in April 1999, after Maria gave him an affidavit purportedly signed by Cordova. Brandstrader wanted to subpoena her so she would be ready to testify. Despite his concerns, Brandstrader had her subpoenaed because he was not sure he had Desiree available to testify. It took the investigator three days to catch up with Cordova even though she was allegedly cooperating with the defense. Brandstrader had a problem using Cordova as a witness because in December 1997, she was "anything but clear about being an alibi," he was concerned it took so long to get an affidavit from a supposedly cooperating witness, and it took three days to serve her with a subpoena when she was supposed to be there to receive it. Although Cordova was at the courthouse the second day of the trial, she wasn't there when she was supposed to be and Brandstrader did not see her until after the trial. Desiree, who did testify, did not place Cordova at the Highland Park house on June 4.

Brandstrader testified that he never planned to call Chloe Gavin as an alibi witness because she lacked any credibility.

On June 2, 1999, Brandstrader planned to call Desiree Moyet as an alibi witness and did in fact, call her as an alibi witness at trial. He did not have an opportunity to speak with

her until the day she testified because on June 2, he was still in negotiations with her attorney regarding whether she would testify. Desiree's lawyer told him that she would testify consistently with the statement she had given to the police.

Brandstrader testified that he also discussed Desiree's cousin Alexis with Maria Raygoza. According to the alibi defense, Alexis had accompanied Desiree to the Highland Park house on June 4, 1997. Maria told him that she had run into Alexis in late March or April and that Alexis had "made it clear to Maria that she was not going to be helpful." According to Brandstrader, Maria told him she was afraid of Alexis and defendant told him Alexis was "on the other side," which Brandstrader took to mean another gang.

Vincent and Crystal Raygoza and Luis Paredes were on a list Maria had given Brandstrader of people who were at the house. Brandstrader explained that he told her he did not want to call children as witnesses, especially since there were available adults on the list. He acknowledged that he had never interviewed the children. Brandstrader added that because the meeting Maria had at school concerned Vincent being expelled, he did not want to subject Vincent to examination on that subject.

Wendy Morgan was also present at the June 2, 1999, pre-trial meeting. The very first time Brandstrader had met with Maria and Morgan, Morgan had told him she had called the Raygoza home on June 4, 1997, on speakerphone, that Adams had heard the conversation, and that she thought defendant had answered the telephone. At that first meeting, Adams had looked at Morgan and said "[a]re you sure it was Christopher?" Neither Morgan nor Adams ever told him that Morgan had placed the call from a speaker telephone in her bathroom while Adams was also present.

According to Brandstrader, the fact that the State had located and spoken with Thomas O'Connor also affected his decision as to whether to call Morgan as a witness. Brandstrader believed that Morgan's testimony at trial would open up a whole line of collateral issues, that Morgan was looking at "considerable impeachment," and that all of that was not going to help defendant's case in "any way, shape, or form." He therefore informed Morgan at the June 2 meeting that he doubted he would put her on the stand. Brandstrader thought that she appeared to be relieved by his decision.

Prior to the hearing on the motion to suppress, Brandstrader received a letter from Maria stating that Morgan did not want to testify at the hearing. Morgan never expressed a desire one way or the other regarding testifying at trial. Brandstrader testified that it was important for Morgan to testify at the motion to suppress because she was the lawyer making the calls to the police station, but he "saw enough trouble in her testimony" that he thought it was not going to help defendant to have her testify at trial. He was also concerned when he learned that she had become immediately involved after defendant called Maria on June 5 when Morgan had originally informed him she knew nothing about the whole situation until she received a call from the Chicago Police on June 11. Finally, he took into account that Morgan had only allegedly spoken to defendant by telephone and had not actually seen him on June 4.

Subsequent to the June 2 pre-trial meeting, Brandstrader met with defendant and explained to him which witnesses he intended to call and his reasons for doing so. According to Brandstrader, defendant was glad that Desiree was going to testify.

Brandstrader denied ever asking Rodney Adams to assist him during the trial in locating or bringing witnesses into court. Although he was aware that Marie and defendant had allegedly left Highland Park to take Desiree home at 9:30 or 10 p.m., he acknowledged that he had never asked Maria whether she came directly home after that. He did not learn until after trial that Maria and defendant had stopped at Morgan's law office late on the evening of June 4 and denied that Maria or anyone else had ever told him defendant made a telephone call to Desiree's house from the law office that night. He was not aware that June 4 was Maria Raygoza's birthday. He knew that Maria and others had purchased pizza on June 4 but not of what time they arrived back at the house.

Brandstrader stated that his strategy at trial was to attack the eyewitness identifications by establishing the "breakway" conditions of the identification. He explained that the strategy involved establishing that a startling event occurred, injuries occurred, and that under such conditions, the witnesses couldn't possibly have an accurate recollection of who the offender was. Brandstrader also planned to establish that there were conflicting statements regarding the description of the shooter.

Brandstrader was questioned about a May 21, 1999, letter he had sent to Maria Raygoza. The letter stated:

> "Attached is material tendered yesterday by the ASA. As you can see, he believes he has material that would impeach the alibi.
>
> Let me make sure you understand my position.
>
> 1. Alibi's [sic] never work. Unless you have a picture of yourself with the pope on the front of the New York Times, alibis are generally not conclusive.

2. Any impeachment of the alibi is usually fatal, as the trier of fact then believes the defendant is so desperate, that he would put people on the stand that would either lie, or, be confused about where the defendant was at the time of the offense.

3. Christopher's alibi would be impeached. First we do not have Desiree. She will not come forward and I am not going to drag an "alibi-girlfriend" into the courtroom.

Second, whether it is Gavin or not, Naomi will be impeached (see attached material).

Maria is the mother, she is not an alibi.

4. With all due respect to Ms. Morgan, if she wants to put on the defense, I can withdraw and she can have at it.

I speak with twenty years experience not only trying murder cases but appealing them. Christopher's alibi is far from foolproof and will raise more problems then [sic] it will solve.

If Christopher gets convicted without presenting an alibi, you certainly will have fertile grounds in the post conviction area, however, my instinct is to not present an alibi and to attack the State's case as it consists of a flipper (Quezada) and three gang-banging eyewitnesses.

I will discuss with Christopher when he calls."

Brandstrader explained that the letter was in response to a conversation he had with Maria that day. He was trying to convey to her the problems with the alibi and testified that at the time of the letter, he did not have "a single, solid alibi witness who went unimpeached." He also explained that by his reference to raising ineffective assistance of counsel in a post-conviction proceeding, he was advising Maria that he advised against putting on an alibi defense but that if that decision proved fatal to defendant's case, it could be raised in such a proceeding.

Brandstrader acknowledged that he did not interview the ULO members who were shot at in the pizzeria and did not attempt to interview Jennifer Calatayud prior to trial. Brandstrader testified that he cross-examined Calatayud about the fact that she had not originally told the police that she saw defendant the day of the shooting, and acknowledged that when he asked her at trial if she told the police in June, 1997, that she had seen defendant in front of Matos [sic] house on June 4, he had actually meant to say the house where the party took place at 62nd and Sacramento.

After hearing all of the evidence, the trial court denied defendant's amended motion for a new trial, finding that defendant's right to effective counsel had not been violated by Brandstrader's representation of defendant at trial.

Defendant first contends that he was denied his constitutional right to effective assistance of counsel. According to defendant, his counsel's failure to support his alibi defense was not strategic, but was rather due to neglect, a misapprehension of the facts, and an irrational belief that alibi defenses do not work.

To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), a defendant must show that counsel's representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for the error, the result of the trial or appeal would have been different. People v. Towns, 174 Ill. 2d 453, 468-69, 675 N.E.2d 614 (1996). There is a strong presumption that acts and decisions of trial counsel are products of sound trial strategy rather than incompetence. People v. Barrow, 133 Ill. 2d 226, 247, 549 N.E.2d 240 (1989). In general, a decision as to whether to call specific witnesses is a tactical decision which cannot support a claim of ineffective assistance of counsel. People v. Flores, 128 Ill. 2d 66, 85-86, 538 N.E.2d 481 (1989). However, the failure to investigate a defense or a failure to interview witnesses whose testimony may exonerate a defendant may indicate actual incompetency. People v. Juarez, 278 Ill. App. 3d 286, 291, 662 N.E.2d 567 (1996); People v. Krankel, 131 Ill. App. 3d 887, 892, 476 N.E.2d 777 (1985).

Initially, we note that Brandstrader met with Morgan and Adams at least twice and met with Maria 30 times. The record demonstrates that he understood they were potential alibi witnesses. We also agree with the trial court's assessment that he chose not to call them for the reasons he outlined in his testimony and that his decisions were strategic in nature. Similarly, his stated reasons for failing to call Cordova were strategic and the failure to call her does not provide support to defendant's claim of ineffective assistance of counsel.

Defendant contends that Brandstrader could not have made a strategic decision not to call his brother Vincent, sister Crystal, or Luis Paredes because he never interviewed them and had no knowledge of what they had to say. Brandstrader explained, however, that he did not call them because he did not

wish to use children as alibi witnesses, especially in light of the fact that there were a number of potential adult alibi witnesses. Further, it is evident from the testimony given by the children at the hearing on defendant's motion for a new trial that their testimony would have added little, if anything. They claimed to have seen defendant at the Highland Park home on the evening of June 4. Vincent could not recall what time defendant left for Chicago. Luis' testimony that he and his mother (Cordova) left before defendant and Maria arrived back home is not consistent with Cordova's testimony that they stayed until 3 a.m. when Maria and defendant got home. In addition, two of the three children had an obvious bias as they were defendant's siblings, and Brandstrader did not want to subject Vincent to examination regarding being expelled from school, which was the reason for the meeting that resulted in his mother leaving work early on June 4. People v. Truly, 230 Ill. App. 3d 948, 954, 595 N.E.2d 1230 (1992), relied upon by defendant, is distinguishable where the defendant's attorney in that case failed to interview any of the available alibi witnesses whereas here Brandstrader spoke with a number of alibi witnesses, including meeting with Maria 30 times. Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988), also cited by defendant, is distinguished by the fact that the ineffective assistance of counsel in that case was based on counsel's failure to interview the only disinterested alibi witness, whereas here, the witnesses who were not interviewed were biased family members and a friend and their testimony was clearly cumulative. Brandstrader's failure to interview or call the children as alibi witnesses did not constitute ineffective assistance of counsel.

Defendant also maintains that his trial counsel was ineffective in failing to present available telephone records to corroborate the alibi defense. First, as noted by the trial court at the post-trial hearing, even assuming the records are accurate,

they don't reflect who made the calls or who answered the calls. The trial court did not dispute, in ruling on defendant's amended motion for a new trial, that the calls were made, but found that they did not establish that defendant had taken part in any of the calls. Moreover, although the records may have served to corroborate the testimony of various witnesses that such calls were placed, such corroboration does little to impact the strategic reasons given by Brandstrader for not calling the various witnesses.

Defendant argues that, as a result of neglect, Brandstrader "did not even know the most basic facts about his client's alibi defense." In support, defendant points to testimony that Brandstrader did not know the day of the shooting was also Maria Raygoza's 40th birthday and failed to inquire whether Maria and defendant came straight home after allegedly dropping Desiree and Alexis off in Chicago. According to defendant, Brandstrader was thus unaware that a call had been placed to Desiree from Morgan's law office late on the evening of June 4. Further, according to defendant, Brandstrader also failed to inquire about the events of June 5, when defendant called his mother to tell her that there had been a shooting and that he may be implicated. We do not find the above facts show defendant was in Highland Park rather than Chicago at the time of the shooting. Thus, defendant's suggestion that Brandstrader did not understand the "basic" facts about defendant's alibi fails. In addition, Brandstrader demonstrated, through his testimony, that he knew a great deal about the alibi defense. Even Maria Raygoza testified that she told Brandstrader about the events of June 4 each time she spoke with him. According to Brandstrader, he met with Maria at least 30 times. We note also that although defendant alleges ineffectiveness due to Brandstrader's failure to learn of defendant's telephone call to his mother on June 5, there is no question that Brandstrader learned of the conversation, at the latest, from testimony at the

hearing on defendant's motion to suppress in May, 1999, a month prior to trial. Brandstrader's effectiveness at the hearing on the motion to suppress is not at issue: indeed, he was able to successfully suppress defendant's confession to the police. Where Brandstrader was aware of the telephone call at the time of trial, and testified that his knowledge of the telephone call played a role in his decision not to call Maria, we fail to see how any failure to learn of the telephone call prior to May, 1999, is relevant. Nor do we agree with defendant's assertion that the June 5 statement to his mother was favorable to him in that it helped to explain how he was misidentified, rather than incriminating. Rather, we agree with the trial court that the statement appears to be incriminating in nature and one that a competent attorney would not want before the trier of fact.

Defendant maintains that Brandstrader's trial strategy was guided by his "irrational belief," set forth in the May 22, 1999, letter to Maria Raygoza, that alibis don't work and that mothers do not make good alibis. Defendant's assertion that Brandstrader's statements represented an "out-of-hand rejection of a viable defense without investigation" is not supported by the record. Initially, we note that defendant's contention is significantly weakened by the fact that Brandstrader did in fact put on an alibi defense for defendant at trial. In addition, Brandstrader explained at the post-trial hearing that based on his 25 years of experience working in criminal defense, he did not believe that alibi defenses usually worked. He explained that his statements in his May 22, 1999, letter to Maria were in response to a telephone conversation they had just had regarding putting on an alibi defense. He stated that he was trying to make the point to her that at that time he did not have a single solid alibi witness who went unimpeached. Desiree, the alibi witness that he did call, did not agree to testify until just before trial. Brandstrader's testimony also suggested that he believed mothers, due to their bias, would always be willing

to serve as alibis and were thus not persuasive. We find that the record as a whole reflects that Brandstrader did not reject an alibi defense "out-of-hand." Instead he made a decision to present what he thought to be the best alibi witness while declining to put other potential alibi witnesses on for stated strategic reasons.

Defendant also contends that despite Brandstrader's professed trial strategy of attacking the State's case as consisting of a turncoat fellow gang member and three eyewitnesses from an opposing gang, the record reveals Brandstrader was totally unprepared at trial to attack the State's case. The record reveals that although Brandstrader did not interview the State's witnesses prior to trial, he did cross-examine them in an attempt to establish that there were conflicting statements regarding what the shooter looked like and that the identifications of defendant were unreliable. Upon examining the record, we are satisfied that Brandstrader's execution of his stated trial strategy, as demonstrated by his questioning of the witnesses and his closing argument, was not constitutionally defective.

Defendant argues that Brandstrader was completely unprepared to cross-examine Jennifer Calatayud, who testified at trial that she saw defendant in the neighborhood close to the time the shooting took place. At trial, Brandstrader first requested that Calatayud's testimony not be considered against defendant. When the trial court stated that it would consider only her statement about defendant and co-defendant Matos being together on the evening of the shooting, Brandstrader questioned her to establish that when she spoke with the police in June, 1997, she had not told them that she had seen Matos and defendant together on June 4. During closing arguments at trial, Brandstrader re-emphasized to the court that Calatayud had not told the police in June, 1997, that she saw defendant

with Matos on June 4, 1997. Considering that Calatayud's testimony was only considered against defendant for her statement that she had seen defendant and Matos together the night of the murder, and Brandstrader established through cross-examination that her trial testimony differed from what she had originally told the police, we cannot say the cross-examination was ineffective in any way. The instant case is distinguishable from the cases relied upon by defendant, where prior inconsistencies were not brought out on cross-examination. See People v. Skinner, 220 Ill. App. 3d 479, 484, 581 N.E.2d 252 (1991); People v. Garza, 180 Ill. App. 3d 263, 267-69, 535 N.E.2d 968 (1989).

According to defendant, Brandstrader's failure to interview any witnesses who were in the neighborhood prevented him from learning about Eduardo Lerma (Lucky), who defendant now asserts looks just like defendant and was the most likely suspect in the murder. Specifically, defendant contends his trial counsel should have spoken to Cristina Cortes and Teena Rodriguez to learn that Lucky was at the party at 62nd and Sacramento wearing a maroon beret, and to David Torrent or co-defendant Matos to learn that Lucky was seen walking towards the pizzeria just prior to the shooting and that he had been shot by ULO members a month earlier and therefore had a revenge motive.

We disagree with defendant's assertion that the failure to interview those witnesses constituted ineffective assistance of counsel. The State does not deny that Lucky was at the party and was possibly near the pizzeria at the time of the shooting. They point out that those facts do not preclude defendant from being the shooter, especially in light of the fact that defendant was identified as the shooter by three of the persons inside the pizzeria. Significantly, it was established at trial that Lucky had a black pony tail, while eyewitnesses to the shooting maintained

that the shooter had a blond ponytail, like the one several other persons testified defendant had in early June, 1997. Other problems with the testimony of the above witnesses are evident upon an examination of the testimony they gave at the post-trial hearing. It was established, for instance, that although Teena Rodriguez did not see defendant at the party, she left the party at 6 p.m., more than three hours before the shooting. We note also that the trial court made a specific finding at the post-trial hearing that Torrent was not a credible witness.

Having established that Brandstrader's representation of defendant did not fall below an objective standard of reasonableness such that defendant was denied his right to counsel, we need not examine the second prong of the Strickland test: whether there is a reasonable probability that but for counsel's deficiencies, the result of the trial would have been different. See Strickland, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. 2069 (noting that where defendant makes an insufficient showing regarding one component of the ineffective assistance inquiry, there is no need to address both components). Briefly, we note that were we to address this issue, we would find that defendant has failed to show that had his counsel put on all of the witnesses and taken the various actions defendant now believes he should have, there is a reasonable probability that defendant would not have been convicted. Defendant argues that his trial counsel should have attacked the witness' identifications because one of the victims may have been told defendant's name prior to the line-up. However, defendant does not explain how a witness who had never seen him prior to the shooting would be aided in making a line-up identification by being advised of his name. Defendant argues that his trial counsel should have argued that Lucky was the most likely suspect but does not explain how that would have changed the outcome where witnesses stated the shooter had a blond ponytail, as did defendant, and the

evidence showed that Lucky's ponytail was black. Nor would putting on the various alibi witnesses and allegedly corroborating evidence have changed the result. The various alibi witnesses did not all give "the exact same testimony as Desiree," as argued by defendant. Rather, an examination of their testimony reveals a number of inconsistencies. More significantly, the witnesses were either biased and/or could have been impeached to varying degrees. As the trial court held in ruling on defendant's amended motion for a new trial, Brandstrader "made a rational decision" not to call the alibi witnesses for various strategic reasons and instead took his best shot with Desiree as defendant's lone alibi witness. Defendant was convicted after being identified as the shooter by the three people he had shot at and by a fellow gang member who took part in the crime. We cannot say that but for Brandstrader's actions or lack thereof, there was a reasonable probability the result of the trial would have been different.

Defendant also contends that he was denied his due process right to a fair and impartial evidentiary hearing when the trial court assumed the role of an advocate and, from the beginning, made comments indicating it was predisposed to rule against defendant. Specifically, defendant contends that the trial judge expressed his belief that the motion for a new trial was without merit even before seeing the motion, and continually interrupted during the hearing on the motion for new trial to elicit testimony favorable to the State, berate defense counsel, and to assist prosecution witnesses with their answers.

Due process entitles a defendant to a fair and impartial trial before an open-minded, unbiased trier of fact who renders judgment only after trial. People v. Phuong, 287 Ill. App. 3d 988, 993, 679 N.E.2d 425 (1997). "A trial court is free to examine witnesses in its discretion, provided it does not become an advocate, abandoning its function as an impartial

tribunal." People v. Griffin, 194 Ill. App. 3d 286, 296, 550 N.E.2d 1244 (1990). In a non-jury trial, the relevant inquiry is whether the tenor of the court's questioning indicates the court has prejudged the verdict prior to hearing all of the evidence. Griffin, 194 Ill. App. 3d at 296.

Defendant, in his brief, sets forth a number of the instances that he believes support his contention. Having reviewed the record closely, we disagree with defendant's contention that he was denied his due process right to a fair and impartial evidentiary hearing. Briefly, the trial court on two occasions prior to the hearing on defendant's motion for a new trial noted that claims of ineffective assistance of counsel are made in a great number of cases where the defendants are found guilty. The statements do not reflect that the trial court believed that defendant's specific motion was without merit. Indeed, the trial court subsequently heard a great deal of testimony and evidence concerning defendant's motion and, as is evident from the record, paid close attention throughout the proceeding. We disagree with defendant's assertions that the trial court, through interruptions and questioning, was acting as an advocate for the State. Instead, we find the court was, in many of the instances, attempting to clarify events or testimony that was being given for the purpose of making its ruling. The questions, at a minimum, indicate that the trial court was paying close attention not only to the testimony being given but to the previous testimony at both the trial and post-trial hearing. Nor does our review of the record support defendant's contention that the court's interruptions or questions were hostile and that the court interrupted for the purpose of cutting off legitimate lines of inquiry. The court often apologized for the interruptions and in many cases urged defense counsel to continue his line of questioning upon completion of the trial court's questioning. Counsel for defendant at the motion for a new trial specifically noted during his closing argument that the

court had been "very patient" during the course of the hearing. In addition, we note that in ruling on the motions of defendant and co-defendant Matos alleging ineffective assistance of trial counsel, the court stated that it had read the trial transcript twice and had reviewed approximately 2,000 pages of transcript and a large number of exhibits. The court also noted that "contrary to what the lawyers might think," it had no predisposition about motions alleging ineffective assistance of counsel other than a "pre-disposition of doing what I think is the right thing."

Defendant relies upon People v. Phuong, 287 Ill. App. 3d 988, 679 N.E.2d 425 (1997), where a defendant's conviction was reversed upon a finding that the trial court's derogatory remarks, impatience, and sarcasm, taken together, clearly established the trial court's prejudice against the defendant. The record in the instant case, however, reveals that the court, although active in questioning witnesses, was not derogatory, did not become an advocate for the State, and did not prejudge the evidence.

Upon reviewing the record, we find that it simply does not support defendant's assertion that he was denied his due process right to a fair and impartial evidentiary hearing.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

McBRIDE, J., with BURKE, P.J., and GORDON, J., concurring.